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No. 84-724

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

TEXAS A & M UNIVERSITY, et al.,

Appellants,

v.

GAY STUDENT SERVICES, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JURISDICTIONAL STATEMENT

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November 1, 1984

QUESTIONS PRESENTED

1. Does the denial by Texas A & M University, a state supported university, of official recognition and the benefits of such recognition to a gay student organization violate the First Amendment rights of the gay students requesting such recognition?

2. If the First Amendment rights of such gay students are negatively affected by such denial of official recognition, does Texas A & M University have a sufficiently compelling state interest to justify such a denial in view of the increased overt homosexual activity and the resulting physical, psychological, and disease ramifications likely to occur in the student body as a result of such official recognition?

3. Did the United States Court of Appeals for the Fifth Circuit err in holding that the district court's findings of fact were clearly erroneous?

4. Did the United States Court of Appeals for the Fifth Circuit err in making its own findings of fact, as opposed to remanding the case to the district court for additional findings of fact, concerning Texas A & M University's proffered justification for nonrecognition and compelling state interest, especially in view of (a) the overwhelming evidence supporting such findings presented in the trial court (but not formally made part of the findings of fact, though evidenced by footnote number one in the findings of fact); and (b) the apparent finding by the Fifth Circuit that the trial court failed to make such findings because of an erroneous view of the law?

Texas A & M University has been given authority by the Attorney General of the State of Texas, Jim Mattox, to pursue this appeal with counsel outside the Attorney General's office. As a party to the proceeding below, the State Attorney General's office is aware that the constitutionality of a state statute has been drawn into question. Also the State of Texas, via Texas A & M University, is still a party to this proceeding. Therefore 28 U.S.C. § 2403(b) is not applicable. Parties to the proceeding in the United States Court of Appeals for the Fifth Circuit were:

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

Appellants Texas A & M University (TAMU), the Board of Regents of Texas A & M University, and other Texas A & M University officers and employees, (Defendants below) appeal from the judgment of the Fifth Circuit Court of Appeals in favor of Gay Student Services (GSS), dated August 3, 1984, and reported as *Gay Student Services* v. *Texas A & M University,* 737 F.2d 1317 (5th Cir. 1984). This judgment reversed the judgment of the United States District Court for the Southern District of Texas and remanded the case solely for the entry of injunctive and declaratory relief in accordance with the Fifth Circuit's opinion. (*See* APPENDIX at A-1 *et seq.*)

This lawsuit, seeking declaratory, injunctive, and compensatory relief under 42 U.S.C. § 1983 was originally filed on February 5, 1977. In November of 1977, the district court granted TAMU's motion to dismiss and GSS appealed. The Fifth Circuit vacated and remanded, finding that none of the asserted bases for dismissal were proper. That opinion is reported as *Gay Student Services* vs. *Texas A&M University,* 612 F.2d 160 (5th Cir.), *rehearing denied,* 620 F.2d 300 (5th Cir.), *cert. denied,* 449 U.S. 1034 (1980). (*See* APPENDIX at E-1 *et seq.*).

The district court then held a bench trial in November of 1981. On May 19, 1982, the district court entered a final judgment for TAMU, along with findings of fact and conclusions of law. The opinion of the district court was not officially reported; however, a copy of the court's findings of fact and conclusions of law is reprinted in the APPENDIX at B-1 *et seq.*

JURISDICTION

TAMU's refusal to recognize the group in 1976 was originally premised on two points. First, the Gay Student Services Organization's purposes and goals violated the Texas A & M University Regulations of 1975-76, which stated "Student organizations may be officially recognized when formed for purposes which are consistent with the philosophy and goals that have been developed for the creation and existence of Texas A & M University." Second, homosexual conduct is illegal in Texas, under Texas Penal Code Ann. § 21.06 (Vernon 1974). TAMU officials felt it would be "most inappropriate for a state institution officially to support a student organization which is likely to incite, promote and result in acts contrary to and in violation of the Penal Code of the State of Texas." 737 F.2d at 1320.

This Court has jurisdiction of this appeal by virtue of 28 U.S.C. § 1254(2), in conjunction with 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4037 (1978), p. 34 and *Hamilton* v. *Regents of the University of California,* 293 U.S. 245 (1934). "Identification of enactments that qualify as 'state statutes' for purposes of § 1254(2) should be determined by cases that define the reach of § 1257(2)." Wright, *supra,* at 45. In *Hamilton,* this Court defined 'state statute' for 28 U.S.C. § 1257(2) purposes to include an order of the Board of Regents of a state university, construing such an order as a "statute of the state." Similarly, the Rules and Regulations of TAMU are "statutes of the state" under 28 U.S.C. § 1254(2).

Of central concern in this case is the holding of *Baker* v. *Wade,* 553 F. Supp. 1121 (N.D. Tex. 1983) in which the United States District Court for the Northern District of Texas held Texas Penal Code Ann. § 21.06 (Vernon 1974) (outlawing homosexual behavior) to be unconstitutional. Consequently the issue of whether this state statute violates the Constitution has become very important in this case. The Attorney General of the State of Texas, Jim Mattox, chose not to appeal that case. Appellant (in that case) Hill filed an appeal as Intervenor. The Fifth Circuit Court of Appeals dismissed his appeal in *Baker* v. *Wade,* No. 82-1590 (5th Cir. Sept. 21, 1984). Appellant Intervenor has filed a Motion for Rehearing and a Petition for Rehearing *en banc* in the Fifth Circuit, neither of which have been ruled upon.

Due to misfeasance and malfeasance of prior counsel[1], there was no motion for rehearing filed in the Fifth Circuit

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[1] Prior to granting TAMU the right to obtain new counsel, Mr. Jim Mattox, Attorney General of the State of Texas, refused to appeal this case on behalf of TAMU, despite requests from

Court of Appeals. Therefore, this appeal is being docketed in this Court within ninety days from the date of entry of judgment by the Fifth Circuit, August 3, 1984. A Notice of Appeal was timely filed with the clerk for the Fifth Circuit Court of Appeals on October 31, 1984. (*See* APPENDIX at F-1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people to peaceably assemble . . . .

Texas A & M University Regulations 1975-76 contains the following statement:

> Student organizations may be officially recognized when formed for purposes which are consistent with the philosophy and goals that have been developed for the creation and existence of Texas A & M University.

Texas Penal Code § 21.06, titled "Homosexual Conduct," (and the related definitions in §§ 1.05 and 21.01) provide that "a person commits an offense if he or she engages in deviate sexual intercourse with another individual of the same sex". "Deviate sexual intercourse" is defined in

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TAMU that he appeal the case. Permission to pursue this appeal with new counsel was first received by TAMU from Attorney General Jim Mattox eighty-four days after entry of judgment by the Fifth Circuit. As a result, new counsel for TAMU was unable to file a Motion for Rehearing in the Fifth Circuit and had an extremely limited time to prepare this Jurisdictional Statement. "[P]rior counsel" in no way refers to the former Attorney General, Mark White.

§ 21.01 of the Texas Penal Code as "any contact between any part of the genitals of one person and the mouth or anus of another person".

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

28 U.S.C. § 1254(2) provides for appeal to the Supreme Court of the United States "By appeal by a party relying on a State Statute held by a Court of Appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . . ."

28 U.S.C. § 1257(2) provides for appeal to the Supreme Court of the United States from the final judgment of a high state court in which decision can be had "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States . . . ."

STATEMENT

In April of 1976, a group of students at Texas A & M University (TAMU) met with Dr. John Koldus, the University's Vice President for Student Affairs, to discuss the possibility of using university facilities for a group that they had formed called Gay Student Services (GSS). GSS at that particular time did not wish official recognition, but wished to maintain anonymity of its members because of the GSS's understanding that the group's existence might

pose an "uncomfortable" problem in the TAMU community. Dr. Koldus directed the students to Dr. Carolyn Adair, Director of Student Affairs, who advised the students to apply for recognition as a service group rather than a political or social group because there would be fewer problems involved. GSS then filed its application on April 5, 1976, and stated various goals and purposes, among which were to provide a referral service for gay students, to provide the TAMU community with information concerning gay life, to provide speakers to classes and organizations which wished to know more about gay life styles, and to provide a forum for the interchange of gay ideas. This application was then forwarded from Dr. Adair to Dr. Koldus, who is responsible for the final decisions regarding recognition of organizations at TAMU. On May 4, 1976, GSS members met with Dr. Koldus. He told them that he had written a response to their application. The students met with Dr. Koldus in June and September of 1976, again requesting action on their application. On November 29, 1976, Dr. Koldus issued a letter denying recognition to GSS.

Dr. Koldus' denial was premised on three points. First, Dr. Koldus asserted that homosexual conduct was illegal in Texas and it was inappropriate for TAMU to officially support an organization likely to incite, promote, and result in homosexual activities. Second, Dr. Koldus stated that TAMU staff and faculty, not TAMU student organizations, were responsible for providing referral services, educational information, and speakers to students and the larger public. Third, Dr. Koldus stated that "the stated purposes and goals of the Gay Student Services are not consistent with the philosophy and goals that have been developed for the creation and existence of Texas A & M University." *See* TAMU Rules and Regulations 1975-76. (At trial TAMU proffered two additional defenses of its denial: (a) to

protect the public health and (b) that TAMU has never created a forum open for public discourse).

The District Court granted TAMU's Motion to Dismiss in November of 1977 without stating its reasons for doing so. None of the questions now presented to this Court had been raised at that time. Following said dismissal, the GSS appealed, and on February 20, 1980, the United States Court of Appeals for the Fifth Circuit vacated the district court's dismissal, and remanded to the trial court.

The Fifth Circuit, reported at 612 F.2d 160 (5th Cir. 1980), did not consider any of the questions presented to this Court, but considered only whether the university was a "person" for purposes of 42 U.S.C. § 1983; whether the Eleventh Amendment barred the GSS claim for injunctive and declaratory relief; whether the Plaintiff GSS had sufficient standing to bring the suit; and whether the court had civil rights jurisdiction over the claim presented. The Fifth Circuit essentially found in the affirmative for all the above stated issues and concluded that the district court erred in dismissing the complaint.

Thereafter, TAMU petitioned for rehearing *en banc,* which was denied on May 16, 1980. 620 F.2d 300. TAMU petitioned for writ of certiorari which was denied December 8, 1980. 449 U.S. at 1034. *See* APPENDIX at C-1 and D-1.

This case was then tried before the Honorable Judge Ross N. Sterling in November 1981. The evidence presented at the trial consisted largely of medical testimony from specialists in human sexuality regarding the effect that the presence of a homosexual student group might have on a university campus. TAMU's defense in particular centered on statistics and opinions documenting increased crime rates, disease rates, and severe emotional problems found within the homosexual community.

On May 19, 1982, the district court entered a final judgment for TAMU, along with findings of fact and conclusions of law. Said final judgment concluded "that Plaintiffs failed to prove by a preponderance of the evidence that Defendants' refusal to recognize Gay Student Services as an official student organization at Texas A & M University infringed upon Plaintiffs' freedom of speech or association." This was the first reference in any of the lower court proceedings to the issue of GSS's First Amendment rights.

The district court found that Texas A & M University had not created a forum that was generally open to all student groups, in that Texas A & M University had never recognized fraternal organizations. The trial court also found that Texas A & M University's refusal to extend official recognition to Gay Student Services was not a restraint on the students' right of association, since the purpose of the association was not a goal otherwise protected by the First Amendment.

In a footnote to its findings of fact, the district court stated that it "finds the testimony that male homosexuals pose a significant public health problem because they have a greater incidence of venereal disease to be *credible.* While the compelling need for all state agencies, including Texas A & M University, to discourage this public health risk *might be a sufficient basis for denial of recognition* of Gay Student Services, the University did not offer this reason as a basis for Koldus's decision in 1976, and the Court does not rely upon this evidence as a basis for a decision." (emphasis added). *See* APPENDIX B-3 at footnote 1. Consequently, the district court made no finding as to whether TAMU showed a sufficiently "compelling interest" to justify its refusal to recognize GSS. This is the first reference in any of the lower court proceedings to the issue of TAMU's compelling state interest in protecting the public health.

Following the district court's judgment for TAMU, in 1982, GSS appealed to the Fifth Circuit. In its August 3, 1984 opinion, 737 F.2d at 1318, the Fifth Circuit held that TAMU's asserted justifications for refusing to officially recognize GSS were insufficient to justify what the court considered to be infringement of the group's First Amendment rights.

The Fifth Circuit found that the district court's findings and conclusions were clearly erroneous and reversed them. This is the first reference to the issue of whether the findings of fact were clearly erroneous. In considering whether the reasons proffered by TAMU for denying recognition to GSS were justifiable, the Fifth Circuit stated that "a[t] oral argument, counsel for TAMU argued that remand for new findings and conclusions would be necessary were we to hold that the district court erred in failing to apply heightened scrutiny to the facts of this case. We do not agree. . . ." 737 F.2d 1328 at n.17. This is the first reference in any of the proceedings to the issue of whether the Fifth Circuit erred in not remanding the case to the district court for additional findings of fact concerning whether TAMU proferred sufficient justfications and a sufficiently compelling interest for nonrecognition.

THE QUESTIONS ARE SUBSTANTIAL

The Fifth Circuit declared that Texas A & M University violated the First Amendment rights to freedom of association of GSS and its members by denial of the GSS request for official recognition. In doing so, the Fifth Circuit completely reversed the district court's holding that GSS had failed to prove that TAMU's refusal impinged upon its First Amendment freedoms of speech or association. The Fifth Circuit's decision has far-reaching implications to the ability of any state supported institution to regulate

its students and the activities they participate in on campus. Additionally, the Fifth Circuit has created for homosexuals a right not specifically enumerated in the Constitution, and one which probably would lead to violation of the state statute prohibiting homosexual activity.

Procedurally, the Fifth Circuit has set a disturbing precedent by *summarily dismissing* the district court's findings of fact, disregarding the rule that fact finding is generally the function of the trial court. Only the trial court is present when the evidence is given. Only the trial court can judge credibility at first hand.

In light of the substantial legitimate governmental interest that a state university has in maintaining a stable learning environment and insuring a healthy student body, this Honorable Court is earnestly requested to note probable jurisdiction and review the questions presented.

I.

The Fifth Circuit Erred in Repudiating the District Court's Finding of Fact That TAMU's Refusal to Officially Recognize GSS Was Not a Restraint on the Students' Right of Association

The district court concluded in its findings of fact that Texas A & M University had not created a forum that was generally open to all student groups since the university had never, at the time of trial, recognized organizations whose primary purpose was social gatherings designed to develop friendships and personal affinities. The district court also found that TAMU's refusal to extend official recognition to GSS was not a restraint on the students' right of association in that the purpose of the GSS was not a goal otherwise protected by the First Amendment. The Fifth Circuit repudiated these findings and found that the

GSS was not a fraternal organization subject to TAMU's general ban. The Fifth Circuit perceived, *without a finding of the district court,* that TAMU's refusal to officially recognize GSS was based upon the homosexual content of the group's ideas.

The Fifth Circuit held that this case was virtually identical to *Healy* v. *James,* 408 U.S. 169 (1972). *Healy* involved a state supported college which refused to recognize a group of students who wished to organize a chapter of "Students for a Democratic Society" during the late 60s. In quoting from *Healy,* the Fifth Circuit found that freedom of association for students is "implicit" in the specified First Amendment freedoms. 737 F.2d at 1327. Quoting from *Healy,* the Fifth Circuit stated that there "can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges the First Amendment freedom of association." *Id.* Having incorrectly analogized the request of a college group which merely advocated a *particular political point of view* to a group of college homosexuals who were most likely to engage in *illegal activity and seriously threaten the health of the community,* the Fifth Circuit found in favor of GSS.

Also, citing *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969), the Fifth Circuit asserted that it found additional authority for the proposition that school regulations may not prohibit a student's right of expression of opinion. *Tinker,* however, merely involved the issue of whether students could wear black arm bands on their sleeves to exhibit their disapproval of Viet Nam hostilities. The Fifth Circuit found this case to exhibit the *"identical issue"* of freedom of association and expression advanced by GSS, and equated *the wearing of arm bands,* in violation of a school policy

prohibiting the wearing of such arm bands, with official recognition of a homosexual organization which, if recognized, in the opinion of testifying experts, would most likely encourage *more homosexual conduct,* resulting not only in *violation of the Texas Penal Code,* but also in an *increase in the number of persons on campus with serious psychological and life-threatening medical problems* proven to be associated with homosexuality.

The Fifth Circuit selectively quoted from *Gay Lib* v. *University of Missouri,* 558 F.2d 848 (8th Cir. 1977) to support its holding. *Gay Lib* held at 852 "that the University of Missouri, acting as an instrumentality of the State, had no right to restrict speech or association simply because it finds the views expressed to be abhorrent." In giving little or no credibility or weight to the evidence of two medical experts who testified at the trial court that formal recognition of the gay group would tend to perpetuate or expand homosexual behavior, the Eighth Circuit found that "even accepting the opinions of Defendant's experts at face value we find it insufficient to justify a governmental prior restraint on the right of a group of students to associate for the purposes avowed in their statement . . . of purpose." *Id.* at 854. In deciding *Gay Lib,* the Eighth Circuit also relied on *Healy* and *Tinker* to support its opinion. Both the Fifth Circuit in this case and the Eighth Circuit in *Gay Lib* erroneously placed heavy reliance upon *Healy* v. *James,* 408 U.S. 169 (1972), and *Tinker* v. *Des Moines Independent Community School District* 393 U.S. 503 (1969), as demonstrated above.

Of particular importance to the questions presented before this Court is the dissent of Mr. Justice Rehnquist, joined by Mr. Justice Blackmun, in the denial of petition for writ of certiorari in *Ratchford* v. *Gay Lib,* 434 U.S. 1080 (1978). This case involved a petition for writ of

certiorari from the Eighth Circuit's decision in *Gay Lib* v. *University of Missouri, supra.* As Mr. Justice Rehnquist stated at 1084, "the question is more akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge appeal of a state law providing that measles sufferers be quarantined." The question is essentially whether a university can deny recognition to an organization, the activities of which, expert witnesses testify, will in and of themselves lead directly to violations of state criminal law. Citing from *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969), Mr. Justice Rehnquist continued his dissent saying that "some speech that has a propensity to induce action prohibited by the criminal laws may itself be prohibited. *A fortiori,* speech and conduct combined which have that effect may surely be placed off limits of a university campus without doing violence to the First or Fourteenth Amendments." *Id.* at 1085.

In his *Brandenburg* concurrence, Mr. Justice Douglas cited at 395 U.S. 456 the classic example of one who falsely shouts "fire" in a crowded theatre and stated "this is however, a classic case where speech is brigaded with action."

There is no right of freedom of expression or association when the result is speech *brigaded with conduct* that is morally repulsive or illegal, as is the case at hand.

II.

Conflict Between the Circuits

The facts of this case present an issue of speech *brigaded with conduct.* After concluding that GSS's First Amendment rights had been violated, the Fifth Circuit concluded that *none* of TAMU's reported justifications, which

included likely violations of the Texas Penal Code, certain violations of the rules and regulations of Texas A & M University, and increased psychological and medical problems for students at the campus were "sufficient to justify the infringement on Appellants' (GSS and its members) First Amendment rights." 737 F.2d at 1330.

The Fifth Circuit's opinion directly conflicts with the D.C. Circuit's opinion in *Dronenburg* v. *Zech,* No. 82-2304 (D. C. Cir. August 17, 1984), (opinion by Justice Bork) in which the D.C. Circuit held that private, consensual, homosexual conduct is not constitutionally protected. *Dronenburg* held that the Supreme Court has never defined the right of privacy so broadly as to encompass homosexual conduct, citing *Poe* v. *Ullman,* 367 U.S. 497 (1961), (Harlan, J. dissenting), and citing the Supreme Court's summary affirmance of the district court judgment upholding a Virginia statute making it a criminal offense to engage in private homosexual conduct, *Doe* v. *Commonwealth's Attorney for Richmond,* 425 U.S. 901 (1976), facts of the case cited in 403 F. Supp. 1199 (E.D. Va. 1975).

The Fifth Circuit, in the case at hand, placed great reliance upon *Gay Student Organization* v. *Bonner,* 509 F.2d 652 (1st Cir. 1974), in which the First Circuit Court of Appeals held that prohibiting an organization from holding social activities on the campus denied members of the organization the right of association. The court's decision in that case was based primarily upon the fact that the district court found no improper conduct, and it did not appear that the university ever concerned itself with defining or regulating sexual behavior, even if it was short of criminal activity, which may have offended the community's sense of propriety. In fact, the *Bonner* case stated that *"thus if a university chose to do so, it might well be able to regulate overt sexual behavior, short of criminal activity,*

which may offend the community's sense of propriety, so long as it acts in a fair and equitable manner." 509 F.2d at 663. The *Bonner* court noted that a university is by no means bereft of power to regulate conduct on campus. Not only may the university act to prevent criminal conduct by policies focused on real and established dangers, *but it can proscribe advocacy of illegal activities falling short of conduct if such advocacy or conduct is directed at producing or is likely to incite imminent lawless action.* 509 F.2d at 662.

Another case heavily relied upon by the Fifth Circuit in the case *sub judice* is *Gay Alliance of Students* v. *Matthews,* 544 F.2d 162 (4th Cir. 1976). *Gay Alliance* held that a university's refusal to register a gay student association on the same terms and conditions as other student organizations violated the First and Fourteenth Amendments. However, at page 166, the court clearly states that "[i]f, on the other hand, VCU's [Virgina Commonwealth University] concern is with the possible rise in the incidence of actual homosexual conduct between students, then a different problem is presented. *We have little doubt that the University could constitutionally regulate such conduct* [citing *Doe* v. *Commonwealth's Attorney for Richmond,* 425 U.S. 901 (1976)]."

The cases cited by the Fifth Circuit state that even if there is a first amendment freedom of association right for homosexuals to gather together and express ideas, a university is nevertheless constitutionally and legally justified in regulating such meetings and activities if they are likely to result in conduct which offends the morality or health of the community or is likely to disrupt the school environment, or result in violations of criminal statutes.

III.

The District Court's Findings Were Not Clearly Erroneous

The Fifth Circuit erred in holding that the district court's findings of fact were clearly erroneous. As stated in Rule 52(a) of the Federal Rules of Civil Procedure, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." As stated in *United States* v. *National Ass'n of Real Estate Boards*, 339 U.S. 485, 495, (1950), "[i]t is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the district court apparently deemed innocent."

There was ample evidence produced at the trial court to support all of its findings of fact. Factual findings numbers one through six (*see* APPENDIX at B-2) are fully evidenced in the record, and even the Fifth Circuit makes reference to these facts in its recitation of the "Facts and Procedural History," 737 F.2d at 1319. Factual finding number seven is merely a logical extension and compilation of factual findings one through six. To hold this particular finding to be "clearly erroneous," as the Fifth Circuit does at 737 F.2d 1322, is implicitly to say that all of the other findings are clearly erroneous, a position that is logically impossible to take.

IV.

The Fifth Circuit Erred in Not Remanding The Case for Additional Findings of Fact Particularly in View of the Overwhelming Evidence Supporting Such Findings of Fact

TAMU presented overwhelming evidence to the trial court that official recognition of GSS would probably result in increased homosexual activity and increased psychological and medical problems associated with homosexuality, including, but not limited to, a greater incidence of numerous diseases. For a summary of this testimony, *see* Amicus Brief filed in the Fifth Circuit in this case by Dallas Doctors Against Aids, Inc. at pp. 3-26.

The district court mentioned this medical evidence in footnote number one to factual finding number four in the findings of fact, and the district court found it to be *substantial* and *credible*. However, because factual finding number seven found no restraint of the students' right of association, the district court saw no need to formally concern itself with TAMU's "compelling interest" evidence. The Fifth Circuit erred in not remanding to the district court for findings of fact upon the issue of whether this proferred compelling state interest of protecting the public health would justify regulation and suppression of GSS's First Amendment right of association.

As stated in *Pullman-Standard* v. *Swint*, 454 U.S. 516 (1982) "[w]hen an Appellate Court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings." This Honorable Court agreed in *De Marco* v. *United States*, 415 U.S. 499, at 450 (1974), stating "[f]act finding is the basic responsibility

of the district courts rather than appellate courts, and ... the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court." In *Pullman-Standard*, this Court reversed the court of appeals and held that if a district court's finding of an ultimate fact is set aside for an error of law, the court of appeals is *not* relieved of the requirement of remanding for further proceedings to the court charged with the task of fact finding in the first instance — the district court.

The Fifth Circuit in *Gay Student Services* v. *Texas A & M University*, 737 F.2d 1317 (5th Cir. 1984) acted in direct contravention to the mandate of this Honorable Court. Instead of remanding to the district court for development of new findings of fact, it summarily concluded that the findings of fact and conclusions of law were erroneous, and then wrongly set about making its own findings of fact, admitting in its own opinion that this approach might be "over-zealous." 737 F.2d at 1328 n. 17. The Fifth Circuit erred in not remanding to the district court for additional findings of fact on the crucially determinative issue of whether official recognition of GSS would result in increased psychological and medical health problems, including increased incidence of venereal disease, on the TAMU campus.

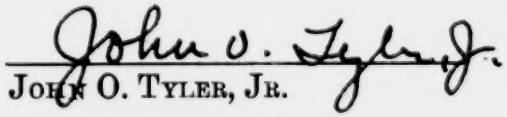
In sum, the denial by Texas A & M University of official recognition to Gay Student Services did not violate any First Amendment rights. Assuming, *arguendo*, that any First Amendment rights were impacted in any way, Texas A & M University proved with overwhelming evidence that it is justified in doing so in order to uphold the criminal statutes of the State of Texas and, furthermore, to prevent an apparently inevitable increase of students with psychological and medical problems associated with homosexuality. Additionally, the United States Court of Appeals

for the Fifth Circuit erred in finding that the district court's findings of fact, which held that denial of official recognition to GSS was *not* a restraint on the students' right of association, were clearly erroneous. The correct course of action that the Fifth Circuit should have taken if it found the trial court's decision to be reversible was to remand the case to the district court for findings of fact concerning TAMU's proffered justification and compelling state interest to protect the public at large, and the student body in particular, upon which there was ample evidence at trial, but no formal findings of fact.

CONCLUSION

Probable jurisdiction should be noted or the Court may wish to consider summary reversal. Alternatively, the Court, pursuant to 28 U.S.C. § 2103, may wish to regard this appeal as a petition for writ of certiorari and act upon it accordingly, perhaps in conjunction with the Court's granting of petition for certiorari in *Board of Education* v. *Nat'l Gay Task Force*, 729 F.2d 1270 (10th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3235 (U.S. Oct. 2, 1984) (No. 83-2030).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Jurisdictional Statement have been served on all counsel of record listed below by placing same in the United States mail, certified, return receipt requested, this 23rd day of November, 1984, in accordance with Sup. Ct. R. 28.[2]

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[2] Originally placed in the United States mail November 1, 1984, a portion of the original mailing was lost or damaged in the U.S. mail. Pursuant to the instructions of, and leave of, Mr. Alexander L. Stevas, Clerk of the United States Supreme Court, and Mr. Francis J. Lorson, Chief Deputy Clerk of the United States Supreme Court, this document has been reprinted with minor non-substantive changes, and has been forwarded to the Court and the parties as quickly as practicable.

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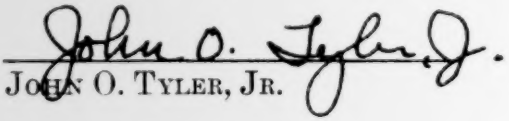

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[3] Service was actually made on the office of Attorney General and on Ann Kraatz, Assistant Attorney General. Jim Mattox is currently the Attorney General and Mark White is now the Governor of the State of Texas. In that Mark White was Attorney General in November of 1982 when this case was argued to the Fifth Circuit and in that Mark White [as] Attorney General of Texas is still counsel of record (Jim Mattox as Attorney General having never made an appearance in this case), Mark White's name is listed above in order to comply with Sup. Ct. R. 28 requiring service on *counsel of record.*

No. 84-724

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TEXAS A & M UNIVERSITY, et al.,

Appellants,

v.

GAY STUDENT SERVICES, et al.,

Appellees.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO JURISDICTIONAL STATEMENT

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November 1, 1984

APPENDIX A

GAY STUDENT SERVICES,
J. M. Minton, Keith Stewart
and Patricia Wooldridge,
Plaintiffs-Appellants,

VS.

TEXAS A & M UNIVERSITY, et al.,
Defendants-Appellees.

NO. 82-2366.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

Aug. 3, 1984.

Following remand, 612 F.2d 160, denial of rehearing, 620 F.2d 300, and denial of certiorari, 449 U.S. 1034, 101 S.Ct. 608, 66 L.Ed.2d 495, the United States District Court for the Southern District of Texas, Ross N. Sterling, J., upheld state supported university's refusal to officially recognize homosexual student group, and group appealed. The Court of Appeals, Brown, Circuit Judge, held that: (1) asserted justifications for such refusal were insufficient to justify infringement of group's First Amendment rights, but (2) award of damages was barred by Eleventh Amendment.

Reversed and remanded.

Larry Sauer, Nelson & Mallett, J. Patrick Weisman, Houston, Tex., for plaintiffs-appellants.

Nan Hunter, Steven A. Rosen, New York City, for amicus—Lambda Legal Defense & Educ. Fund.

M. Robert Schwab, Ross, Banks, May, Cron & Cavin, Thomas J. Coleman, Jr., Houston, Tex., for amicus—Texas Human Rights.

Mark White, Atty. Gen. of Tex., Ann Kraatz, Asst. Atty. Gen., Austin, Tex., for defendants-appellees.

Wm. Charles Bundren, Dallas, Tex., for amicus—Dallas Doctors.

Nadine Taub, Rutgers University Law School, Newark, N.J., for amicus—American Public Health Assn.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, REAVLEY and WILLIAMS, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

Today we address the issue whether a state supported university violates the First Amendment rights of this gay student organization and three of its members by refusing to afford it official recognition. The District Court found that the University's refusal to recognize the group was not based on the content of the group's ideas about homosexuality. Instead, the trial court found that the group had been denied recognition due to the University's long standing policy of refusing to recognize fraternal organizations whose principal purpose is to hold social gatherings to encourage friendship and personal affinity. Finally, the Court held that the University had not created a forum open to fraternal or social groups. Thus, on appeal, the University contends that it never created a generally open forum for First Amendment expression. For these reasons, the District Court concluded and the University argues that there was no constitutional deprivation. We think those findings and conclusions are clearly erroneous and reverse. We affirm, however, the Court's conclusion that recovery of monetary damages is prohibited by the Eleventh Amendment.

FACTS AND PROCEDURAL HISTORY

In April of 1976, a group of students on the Texas A & M University (TAMU)[1] campus met with Dr. John Koldus, the University's Vice President for Student Affairs, to discuss with him the possibility of using University facilities to conduct the business of a group they had formed, Gay Student Services (GSS).[2] The students informed Koldus that they did not at that time seek official recognition, but merely wished to post notices on school bulletin boards, meet on campus, and have access to the student newspaper and radio.[3] Their reasons for not seeking official recognition included their wish to maintain the anonymity of some of their members as well as their understanding that the group's existence might pose an "uncomfortable" problem in the conservative TAMU community.

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[1] TAMU is a state supported University, part of the Texas A & M University System, organized pursuant to Tex.Educ.Code §§ 85.01 *et seq.* (Vernon Ann.).

[2] GSS grew out of another gay group originally founded in 1975, called "Alternative." Dr. Sherri Skinner, a founding member of GSS, testified that Alternative was a community group rather than a student group. GSS was founded as a TAMU student group in 1976 by Skinner and Patricia Wooldridge, Michael Minton, Charles George, Kathryn Kraatz, and Michael Garrett.

[3] The advantages of official recognition include the following:

1. Use of campus facilities;
2. Advertising on campus;
3. Availability of student activities' funds;
4. Use of office area within the Student Programs Office;
5. Assistance in preparing an organization budget;
6. Secretarial services;
7. Authorization to hold meetings and functions on campus;
8. Primarily free use of university meeting rooms and facilities;
9. Free use of banking facilities at Student Finance Center;
10. Use of an organization mailbox in the Student Finance Center;
11. Access to free publicity for the organization in publications such as the "All-University Calendar," the "Student Organization Guide," and others;

Koldus advised the students that no form of limited recognition was available and referred them to Dr. Carolyn Adair, Director of Student Affairs, to receive information regarding the requirements for official recognition. Dr. Adair advised the students to apply for recognition as a service group rather than a political or social group because there would be fewer problems. Accordingly, the goals and purposes reflected on GSS's application were service-related. The application, dated April 5, 1976, stated the following goals and purposes:

> 1) To provide a referral service for students desiring professional counseling including psychological, religious, medical, and legal fields.
>
> 2) To provide to the TAMU community information concerning the structures and realities of gay life.
>
> 3) To provide speakers to classes and organizations who wish to know more about gay lifestyles.
>
> 4) To provide a forum for the interchange of ideas and constructive solutions to gay people's problems.

Dr. Koldus directed Dr. Adair to forward GSS's application directly to him rather than to the Student Organization Board, which is ordinarily the first step in attaining recognition. Koldus, who is responsible for the final decision regarding recognition, stated that this was his usual procedure when dealing with applications presenting special problems. Sherri Skinner, one of the group's founding

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12. Use of campus bulletin boards to publicize activities;
13. Use of kiosks;
14. Use of locator service maintained at student activities office;
15. Facilities scheduling;
16. Use of University vehicles;
17. Office, working storage space; and
18. Use of graphic arts operations for posters, duplicating and other printing services.

members, testified that Koldus had informed the students at the initial meeting that the University would deny their application.

On May 4, 1976, the student representatives of GSS again met with Koldus, who told them that he had written a response to their application. Koldus stated that University officials had asked him to delay release of the response until Jack Williams, President of the University, and the University legal staff had had an opportunity to study the request. A memorandum dated May 28, 1976 from Williams to Koldus indicated that Koldus had provided information regarding other Texas universities' treatment of similar situations. Furthermore, Williams' memo stated that TAMU would not recognize GSS "until and unless we are ordered by higher authority to do so." The students met with Koldus in June and September of 1976, again requesting action on their application. Finally, Dr. Koldus issued a letter denying recognition on November 29, 1976.[4]

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[4] The body of Koldus' letter, addressed to Michael Garrett of Alternative, reads as follows:

> The request to recognize the student organization called 'Gay Students Services' was forwarded to my office for action. I have read and studied the request and, on the basis of the information presented, am denying the group official university recognition.
>
> Contained within the *Texas A & M University Regulations 1975-76* is the following statement: 'Student organizations may be officially recognized when formed for purposes which are consistent with the philosophy and goals that have been developed for the creation and existence of Texas A & M University.' Homosexual conduct is illegal in Texas and, therefore, it would be most inappropriate for a state institution officially to support a student organization which is likely to incite, promote and result in acts contrary to and in violation of the Penal Code of the State of Texas.
>
> Furthermore, the university administrative staff and faculty are responsible for providing referral services, educational information, appropriate speakers for classes and a forum for

Dr. Koldus' denial was premised on two points. First, Koldus asserted that because homosexual conduct was illegal in Texas at that time,[5] it would be inappropriate for TAMU officially to support an organization likely to "incite, promote and result" in homosexual activity. Second, Koldus stated that the TAMU staff and faculty, not TAMU student organizations, were responsible for providing referral services, educational information, and speakers to students and the larger public. Thus, Koldus concluded that the stated purposes and goals of TAMU were not "consistent with the philosophy and goals" of TAMU. Nowhere in the letter did Koldus assert that denial of recognition was premised on the fraternal nature of GSS.

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the interchange of ideas. Student organizations do not have the educational experience, the responsibility nor the authority to educate the larger public. The responsibility for the education of the students at Texas A & M University resides by law with the university administrative staff and faculty.

It is my contention, therefore, that the stated purposes and goals of the 'Gay Student Services' are not 'consistent with the philosophy and goals that have been developed for the creation and existence of Texas A & M University.'

[5] Tex. Penal Code § 21.06 (Vernon Ann.), still on the books, provides as follows:

Homosexual Conduct

(a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.

(b) An offense under this section is a Class C misdemeanor.

Id.

In *Baker* v. *Wade*, 533 F.Supp. 1121 (N.D. Tex. 1982) the District Court held that the statute was not rationally related to any legitimate state interest and therefore violated the gay plaintiff's right to equal protection under the laws. Furthermore, the Court held that the right of privacy extends to private sexual conduct between consenting adults, whether heterosexual or homosexual. The District Court thus found the statute unconstitutional. The State of Texas appealed, and a decision is now pending in the Fifth Circuit. – F.2d – (5th Cir. 19-) (No. 82-1590, argued April 17, 1984).

This lawsuit, seeking declaratory, injunctive and compensatory relief under 42 U.S.C. § 1983, was filed in February of 1977. In November of 1977, the District Court granted TAMU's motion to dismiss without stating its reasons for doing so, and GSS appealed. We vacated and remanded, finding that none of the asserted bases for dismissal were proper. *Gay Student Services* v. *Texas A & M University*, 612 F.2d 160 (5th Cir.), *cert. denied*, 449 U.S. 1034, 101 S.Ct. 608, 66 L.Ed.2d 495 (1980). The District Court held a bench trial in November of 1981. The evidence presented at trial consisted almost solely of medical testimony from specialists in human sexuality regarding the effect the presence of a homosexual student group might have on a university campus. The defense in particular centered on statistics and opinions documenting increased crime rates and severe emotional problems found within the homosexual community. The defense presented no testimony at trial regarding whether GSS functioned as a purely social organization.

On May 19, 1982, the District Court entered a final judgment for TAMU, along with findings of fact and conclusions of law. On appeal, GSS asserts that these findings and conclusions were erroneous and require reversal. We agree, for the reasons that follow.

THE NATURE OF GSS

In its findings of fact, the District Court found that TAMU "did not and has not to the time of trial in this case, recognized fraternal organizations, i.e. student groups whose principal if not sole purpose is to hold social gatherings to encourage friendships and personal affinity." The record shows that in October 1977, Dr. Koldus denied recognition to Sigma Phi Epsilon, a national social fraternity, by stating the following policy:

> For over one hundred years, Texas A & M has chosen not to include the national social fraternity and sorority system as an official part of its educational program. The University has supported the premise that its social character was developed in the concept of togetherness in that all students were Aggies and that a social caste system would detract from this most important concept which welded together the students that attended Texas A & M.
>
> * * * *
>
> As an administrator, it is my responsibility to attempt to perpetuate these traditions which have added not only to the character of the institution but to its strength. It is upon this premise that I deny official university recognition of Sigma Phi Epsilon.

At the heart of the findings and conclusions of the District Court was its decision that GSS was merely a "fraternal or social" group "whose message is mere friendship and personal affinity." This lead the Court to conclude that GSS was not denied recognition "based upon the content of [its] ideas about homosexuality, since the group is not trying to convey any message about homosexuality," but rather GSS was a "fraternal" organization subject to TAMU's traditional ban. We think this factual finding was clearly erroneous, for several reasons.

Such a finding is utterly at odds with the asserted purposes of GSS, which sought recognition to provide services and information regarding gay issues to gay persons and to the general public. *See* Statement of Goals and Purposes, *supra*. Moreover, Dr. Koldus' asserted reasons for denying recognition were clearly based on his perception that the organization *would* attempt to convey ideas about homosexuality. Nowhere in his letter of November 29 does Koldus state that the University's refusal to recognize GSS was based on anything other than reasons tied to the homo-

sexual nature of the group.[6] *See* text of letter at footnote 4, *supra*. Further evidence of TAMU's opposition to recognizing a gay student group is found in a resolution passed by the TAMU Board of Regents following the filing of this lawsuit in 1977. The minutes of the Board's meeting of March 22, 1977 state that the following "policy position" was approved:

> So-called "gay" activities run diabolically [*sic* — diametrically?] counter to the traditions and standards of Texas A & M University, and the Board of Regents is determined to defend the suit filed against it by three students seeking "gay" recognition and, if necessary, to proceed in every legal way to prohibit any group with such goals from organizing or operating on this or any other campus for which this Board is responsible.

Moreover, TAMU presented no evidence at trial regarding the "fraternal" nature of GSS. Such a theory for denying recognition was never advanced in the case until TAMU filed its post-trial brief.[7] Indeed, the sole evidence

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[6] We point out that when Koldus denied recognition to Sigma Phi Epsilon, he made it clear that the fraternal nature of the organization was the reason for the denial.

[7] That this theory was an afterthought is supported by the fact that the parties appear to have agreed at the start of the trial that GSS had stated a prima facie First Amendment case merely by introducing in evidence the application for recognition and Koldus' letter of denial.

> Defense Counsel: I think, your Honor, as a matter of fact, I think he might have accomplished his burden. . . . It is up to us then to show that there was a good reason not to grant the permit. And we propose to do that for two reasons. One, our expert testimony will show that this recognition will lead to increased homosexual conduct which is presently against the laws of Texas. And, too, the venereal disease rate as well as other health problems of the homosexuals is much greater than the normal population.

alleged to support the theory was advanced by GSS itself, in its attempt to show that GSS was a "normal" student group rather than a hotbed of deviant homosexuals anxious to influence the morals of impressionable TAMU students at on-campus meetings. TAMU relies, for example, on the testimony of Dr. Kenneth Nyberg, who agreed to become GSS' faculty advisor and attended some of its early meetings. Dr. Nyberg stated:

> Theirs was a quintessent typical student group.... What you are talking about are students so their interests are those of students.... How do you, you know, how do you get registered? What person to take for a class, what person not to take for a class. What did you do last week? It was mostly concerning ... student issues.
>
> * * * *
>
> They reflected most of the same goals and aspirations and concerns almost all my students did. They subsequently looked into most of the same issues. The singular exception was, of course, the homosexual aspect.

The Court: ... so truly it seems to me the only issue to be tried is whether or not there is a compelling state interest that would override the First Amendment right that you all allege to have been denied and which are admittedly denied.

Defense Counsel: I think we have got the big burden in this case.

The parties then agreed that counsel for GSS would begin with a "bare bones" or "brief presentation" of the prima facie case and then put on expert testimony, anticipating the need to rebut the defense's evidence of compelling state interest. As late as the third day of trial, the trial judge stated, "I think we all agreed that there was at least a prima facie case and that [counsel for GSS] had the problem of putting on as an initial proposition his witnesses to refute and rebut what [the defense witnesses] are going to do." Thus, because the case was tried with the parties apparently agreeing that a prima facie case was stated, we cannot fault GSS for failing to present further evidence of the service-related nature of the group.

It later became clear that GSS elicited such testimony from Dr. Nyberg in order to contravene a later opinion by defense witness Dr. Cameron,[8] who opined that in light of statistical evidence regarding homosexual behavior, "it would be a shock really, if there were not homosexual acts engaged in at or immediately after" a meeting of a homosexual student organization.

Apparently relying upon the testimony of Dr. Sherri Skinner, the District Court also found that GSS was a fraternal group that was "not trying to convey any message about homosexuality"[9] because it was "not organized for political advocacy" and had "no official position regarding repeal of Tex.Penal Code Ann., § 21.06, which makes homosexual conduct a misdemeanor." Dr. Skinner's testimony, like that of Dr. Nyberg, was elicited by GSS for the express purpose of showing that GSS was a typical student service group deserving recognition rather than a substitute for a gay singles bar. Moreover, Dr. Skinner emphasized that any political or social goals GSS may have had were intentionally eliminated from the application for recognition because Dr. Adair had advised the students to seek recognition as a service-type group. What Dr. Skinner actually said, in the context of emphasizing the service-related purposes of GSS, was that while the individual members of

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[8] The District Court recognized that the case was being tried backwards, requiring GSS to present testimony in anticipation of TAMU's defense. *See* n. 7, *supra.*

[9] Could we see no reason in the record to overturn this finding of fact, logic would compel us to find it clearly erroneous. At a very minimum, GSS's quest for recognition, coupled with its desire to publicize its meetings and activities – indeed the very filing of this lawsuit – is clearly a "message" that its members reject society's traditional expectations that they associate furtively and in fear that their homosexuality will be detected. Dr. Skinner's testimony that the group desired to convince the greater public that they are "different" only with respect to their choice of a romantic partner bears this out. *See* note 10, *supra.*

GSS would probably support repeal of the anti-homosexuality laws, "the organization itself has been very careful to keep clear of political action or activism, per se." In light of the fact that TAMU recognizes more service-related student organizations than it does political ones,[10] we simply cannot agree that GSS's failure to organize as a political group renders it a social or fraternal group subject to the TAMU ban.

Finally, we point out that recognition was denied before GSS ever had the opportunity to function as the service-type group it sought to become. The Court's determination regarding the nature of the group was based on how it functioned as an off campus group that had been denied the benefits and privileges of official recognition. The minutes of GSS's meetings reveal that much of the group's meetings time was consumed by discussion of the pending lawsuit. We think evidence concerning how GSS functioned as an off campus group is irrelevant to the determination whether GSS, as it sought to exist, was entitled to official recognition.

For all the foregoing reasons, we conclude that the District Court's factual findings with regard to the nature of

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[10] The 1981 TAMU Student Organizations Guide lists 21 service organizations, including three national service fraternities or sororities, while listing only six political groups. TAMU has also recognized a Women's Awareness Group, which is described as "a group of women and men who discuss women's role in society and especially how women's rights relate to life" at TAMU. The MSC Black Awareness Group "promotes a better understanding of the heritage and culture of Black Americans through cultural and social programs." When asked how she would describe GSS's "message," Dr. Skinner replied that GSS "seeks to inform the students who would not otherwise have any idea of what goes on of the fact that gay people live and function primarily the same as anyone else with the exception that their choice of romantic partner is one of the same gender." In our view, this description is highly similar to that put forth by the officially-recognized Women's and Black students' groups.

GSS were clearly erroneous. We think it clear from the facts that TAMU refused officially to recognize GSS based upon the homosexual content of the group's ideas — which it sought to convey through implementing its stated goals and purposes.

BACKGROUND: THE FIRST AMENDMENT

At least three times in the recent past, this Court has seen fit to make "major expansions in the First Amendment rights of students." *University of Southern Mississippi Chapter of the Mississippi Civil Liberties Union* v. *University of Southern Mississippi,* 452 F.2d 564, 565 (5th Cir. 1971). In *Dixon* v. *Alabama State Board of Education,* 294 F.2d 150 (5th Cir.) *cert. denied,* 368 U.S. 930, 82 S.Ct. 368, 7 L.Ed.2d 193 (1961), we held that the due process rights of six black students were violated by their expulsion without a hearing from a state supported university following their participation in a Montgomery lunch counter sit-in. That decision has since been interpreted to mean that no longer is "attendance at a state university . . . a privilege granted by the state . . . subject to whatever conditions the state [seeks] to impose." *University of Southern Mississippi, supra,* 452 F.2d at 565.

Next, in *Burnside* v. *Byars,* 363 F.2d 744, 749 (5th Cir. 1966), we paved the way for the Supreme Court's landmark decision in *Tinker* v. *Des Moines Independent School District,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), when we held that students' rights to freedom of expression could not be abridged absent material and substantial interference with discipline and order in the school. *Burnside,* like *Tinker,*[11] was a "symbolic speech" case, where

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[11] In *Tinker,* the Supreme Court held that the suspension of students for wearing black armbands to protest the Viet Nam War violated the students' rights to freedom of expression. *Id.,* 393 U.S. at 514, 89 S.Ct. at 740.

students were suspended from school for wearing "freedom" buttons. The Supreme Court cited *Burnside* when it held that:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in of the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained.

Tinker, supra, 393 U.S. at 509, 89 S.Ct. at 738, *citing Burnside, supra,* 363 F.2d at 749.

Finally, despite Judge Wisdom's statement that the decision "require[d] us to break no new ground," in *University of Southern Mississippi* itself we foreshadowed the Supreme Court's reversal of the Second Circuit's decision in *Healy* v. *James,* 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972).[12] In *University of Southern Mississippi,* we held that the University's denial of official recognition to a chapter of the Mississippi Civil Liberties Union violated the First Amendment. *Id.,* 452 F.2d at 568. The District Court had found that the "litigious orientation" of the MCLU might result in frivolous, vexatious and harassing lawsuits likely to impede the legitimate function of the

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[12] In *Healy,* the Supreme Court held that a state university's refusal to grant official recognition to a group of students seeking to form a university chapter of the Students for a Democratic Society (SDS) violated the students' rights under the First Amendment. The *Healy Court,* though it did not specifically rely upon *University of Southern Mississippi,* applied almost precisely the same test. *See* further discussion of *Healy, infra.*

University. We disagreed, after stating the following standards:

> Student rights of free expression may be prohibited only if they 'materially and substantially [interfere] with the requirements of appropriate discipline in the operation of the school.' . . . When the restriction upon student expression takes the form of an attempt to predict in advance the content and consequences of that expression, it is tantamount to a prior restraint and carries a heavy presumption against its constitutionality.

University of Southern Mississippi, supra, 452 F.2d at 566, *quoting Tinker, supra,* 393 U.S. at 509, 89 S.Ct. at 738. We distinguished the Second Circuit's decision in *Healy* on its facts,[13] while pointing out that we in no way implied our approval of that decision.

These three decisions required this Court to extend its own precedent as well as that of the Supreme Court to encompass the then-timely First Amendment problems of days gone by. Our earlier decisions, and certainly their Supreme Court counterparts, remain such an effective weapon against the infringement of fundamental rights that our task today is small in comparison. Moreover, we need not take the extra step of extending those precedents to today's problem by ourselves, for three other Circuit

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[13] We distinguished the Second Circuit's *Healy* from *University of Southern Mississippi* on the basis that "SDS has not expressed any commitment to a policy of litigation, and certain members of SDS have advocated disruption as a means of achieving its goals. [Furthermore], . . . SDS actually demonstrated a refusal to abide by University procedures for dispute resolution when it behaved defiantly during a court-structured hearing to determine its status." *University of Southern Mississippi, supra,* 452 F.2d at 567. We think it telling that despite the apparent presence of these factors in the Second Circuit's opinion, the Supreme Court still opted for reversal on First Amendment grounds. *See* further discussion of *Healy, infra.*

Courts and at least two federal District Courts have marked our way.[14] In treading the First Amendment path, we are ever-mindful of the words of Mr. Justice Jackson in *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 640-42, 63 S.Ct. 1178, 1186-87, 87 L.Ed. 1628, 1639 (1943):

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men.... As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be.... The ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan units ... down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
>
> * * * *
>
> ... the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.
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> * * * *
>
> ... [f]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

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[14] *See* discussion of *Gay Students Organization of the University of New Hampshire* v. *Bonner,* 509 F.2d 652 (1st Cir. 1974); *Gay Alliance of Students* v. *Matthews,* 544 F.2d 162 (4th Cir. 1976); *Gay Lib* v. *University of Missouri,* 558 F.2d 848 (8th Cir. 1977); *cert. denied,* 434 U.S. 1080, 98 S.Ct. 1276, 55 L.Ed.2d 789, *reh. denied,* 435 U.S. 981, 98 S.Ct. 1632, 56 L.Ed.2d 74 (1978), *infra.* *See also Student Coalition for Gay Rights* v. *Austin Peay University,* 477 F.Supp. 1267 (M.D. Tenn. 1979); *Wood* v. *Davison,* 351 F.Supp. 543 (N.D. Ga. 1972).

OFFICIAL RECOGNITION AND FIRST AMENDMENT FREEDOMS

The District Court held that the First Amendment right of freedom of association "does not protect mere friendship or personal affinity but rather protects the right to join with others in the advocacy of beliefs or the exercise of other rights protected by the First Amendment." Because it found that GSS's message was "mere friendship and a sharing of concerns about classes and professors," the Court concluded that appellants' right to freedom of association under the First Amendment was not infringed. This fact finding precluded it from reaching any other First Amendment issues, so the Judge thought. We have already determined that the Court erred in finding that TAMU's reasons for the denying recognition to GSS were not based on the content of its message. Thus, we need only determine whether such a denial violated appellants' rights under the First Amendment.

In *Healy* v. *James*, 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972), the Supreme Court was faced with a situation nearly identical to that before us today. In *Healy*, a state supported college refused to recognize a group of students who wished to organize a local chapter of Students for a Democratic Society (SDS) during the late 60s, when SDS groups on some campuses had been a "catalytic force" in "widespread civil disobedience" on college campuses. *Id*, 402 U.S. at 170-72, 92 S.Ct. at 2341. The benefits of recognition in *Healy* were nearly identical to the benefits of which GSS was deprived, as was at least one of the asserted reasons for the denial: "the organization's philosophy was antithetical to the school's policies." *Id.*, 402 U.S. at 175-76, 92 S.Ct. at 2343. The students sued, basing their claims on the denial of First Amendment rights of expression and association. *Id.*, 402 U.S. at 177, 92 S.Ct. at 2344.

The Court began its analysis by pointing out that while a university certainly has the right to " 'prescribe and control conduct' " on its campus, the " 'vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' " *Id.*, 402 U.S. at 180, 92 S.Ct. at 2345-46, *citing Tinker* v. *Des Moines Independent School District,* 393 U.S. 503, 507, 89 S.Ct. 733, 737, 21 L.Ed.2d 731, 738 (1969); *Shelton* v. *Tucker,* 364 U.S. 479, 487, 81 S.Ct. 247, 251, 5 L.Ed.2d 231, 236 (1960). Perceiving college classrooms and their "surrounding environs as a 'marketplace of ideas,' " the Court reaffirmed "this Nation's dedication to safeguarding academic freedom." *Healy, supra,* 408 U.S. at 180-81, 92 S.Ct. at 2346, *quoting Keyishian* v. *Board of Regents,* 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629, 640 (1967).

[1] In *NAACP* v. *Alabama ex rel. Patterson,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), Justice Harlan for a unanimous Court articulated the basis for recognizing the freedom of association that has since become firmly embodied in our First Amendment jurisprudence:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.... It is beyond debate that freedom to engage in association for advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.... Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

Id., 357 U.S. at 460-61, 78 S.Ct. at 1163, 1171. Thus, as the *Healy Court held,* freedom of association is "implicit" in the specified First Amendment freedoms. *Healy, supra,* 408 U.S. at 181, 92 S.Ct. at 2346.

[2, 3] In *Healy* the Court stated that there "can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges" the First Amendment freedom of association. *Id.*[15] The university bears the burden of justifying its decision rejecting the application for recognition. *Id.*, 408 U.S. at 184, 92 S.Ct. at 2347. Although university authorities have a legitimate interest in prohibiting student activities intended to and likely to incite or produce imminent lawless action or those that materially and substantially disrupt the work and discipline of the school, the record in *Healy* disclosed only an unsubstantiated fear or apprehension that recognition of the group would produce such a result. *Id.*, 408 U.S. at 188-190, 92 S.Ct. at 2349-50, *citing Brandenburg* v. *Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 1829, 23 L.Ed.2d 430, 434 (1969); and *Tinker, supra*, 393 U.S. at 513, 89 S.Ct. at 740. Thus, the Court found the University's asserted reasons for denying recognition insufficient to meet its "heavy burden" of justifying the infringement on the students' right to

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[15] The "primary impediment to free association flowing from nonrecognition is the denial of the use of campus facilities for meetings and other appropriate purposes." *Healy, supra*, 408 U.S. at 181, 92 S.Ct. at 2346. The Court also observed that use of campus bulletin boards and the school newspaper were essential to the group's associational interest as devices for communication. *Id.* Finally, "the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students." *Id.*, 408 U.S. at 181-82, 92 S.Ct. at 2346.

In the instant case, the benefits of recognition denied to GSS included all of the above, as well as the right to receive a portion of the TAMU bookstore profits. The *Healy* Court stated that the record did not enable it to consider the inability to receive funding from the school budget a factor. In this case, then, GSS was denied at least one additional benefit specifically found lacking in *Healy*. *Healy, supra*, 408 U.S. at 182 n. 8, 92 S.Ct. at 2346 n. 8. *See also* list of benefits of gaining recognition at note 3, *supra*.

freedom of expression. *Healy, supra,* 408 U.S. at 184, 92 S.Ct. at 2348.[16]

We think that the standards enunciated in *Healy* are precisely on point in this case. We therefore turn to TAMU's asserted reasons for denying recognition to GSS to determine their constitutionality under *Healy.*

ASSERTED JUSTIFICATIONS

[4] In his letter denying GSS official recognition, Dr. Koldus stated that GSS's goals and purposes were not consistent with the philosophy and goals of TAMU. This alone as a reason for denying recognition is clearly forbidden by *Healy,* where the Court specifically rejected for constitutional purposes the college president's statement that SDS's philosophies of destruction, violence and disruption were " 'counter to the official policy of the college.' " *Healy,*

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[16] The Court remanded, however, because it was unable to ascertain from the record whether the college's requirements for recognition included that the group formally affirm its willingness to abide by reasonable campus regulations, or whether the group intended to abide by those regulations. Thus, the Court concluded that recognition "may be denied to any group that reserves the right to violate any [constitutionally] valid campus rules with which it disagrees." In *Healy,* however, on-campus SDS representatives had "equivocated" during a hearing before the Student Affairs Committee when asked whether the group could ever envision interrupting a class and when asked other similar questions. This, coupled with SDS participation in unrest on other campuses, raised the "considerable question" whether they intended to abide by reasonable regulations regarding campus disruption. *Id.,* 408 U.S. at 193-94, 92 S.Ct. at 2252-53.

In the instant case, on the other hand, Dr. Skinner specifically testified that GSS was willing to agree to all reasonable restrictions imposed by TAMU. Moreover, there was no testimony that gay organizations on other campuses had failed to comply with university regulations. Perceiving no evidence in this case that GSS intends to flaunt constitutionally valid TAMU regulations, we see no reason to follow the *Healy* Court's lead in remanding on this issue.

supra, 408 U.S. at 187, 92 S.Ct. at 2349. The Court held that:

> The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition. As repugnant as these views may have been . . ., the mere expression of them would not justify the denial of First Amendment rights. Whether petitioners did in fact advocate a philosophy of 'destruction' thus becomes immaterial. The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.

Id., 408 U.S. at 187-88, 92 S.Ct. at 2349.

Dr. Koldus proffered two additional, more specific reasons for denying recognition to GSS. First, he stated that because homosexual conduct was illegal in Texas, it would be inappropriate for TAMU to recognize a group likely to "incite, promote, and result" in homosexual acts. Second, he stated that student organizations did not have the "educational experience, the responsibility or the authority to educate the larger public." The District Court did not reach these issues because its findings of fact precluded analysis under any form of heightened scrutiny.[17]

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[17] At oral argument, counsel for TAMU argued that remand for new findings and conclusions would be necessary were we to hold that the District Court erred in failing to apply heightened scrutiny to the facts of this case. We do not agree, for several reasons. First, during trial, the District Court permitted full development of appellees' asserted compelling state interests. Indeed, the case went forward upon an understanding that this was the sole issue before the Court. See discussion at notes 7 and 8, *supra.* Inexplicably, the Court made only passing mention of its conclusions with regard to any of the evidence adduced during the entire trial:

> At trial, Defendants did offer evidence that recognition of Gay Student Services would tend to encourage more homosexual conduct, resulting not only in violations of the penal code but also in an increase in the number of persons with

As to TAMU's asserted interest in preventing expression likely to "incite, promote, and result" in then-illegal homosexual activity, we emphasize that while Texas law may prohibit certain homosexual practices, no Texas law makes it a crime to *be* a homosexual. Furthermore, there is no evidence that any illegal activity has taken place as a result of GSS's existence in the past, nor is there any evidence that GSS is an organization devoted to advocacy and incitement of imminent illegal, specifically proscribed homosexual activity. Consistent with *Healy,* we cannot conclude

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psychological and medical problems associated with homosexualty. The Court finds the testimony that male homosexuals pose a significant public health problem because they have greater incidence of venereal disease to be credible. While the compelling need for all state agencies, including Texas A & M University, to discourage this public health risk might be a sufficient basis for denial of recognition of Gay Student Services, the University did not offer this reason as a basis for Koldus' decision in 1976, and the Court does not rely upon this evidence as a basis for its decision.

Instead of basing its conclusions on the theories and evidence before it, the Court adopted TAMU's after-the-fact asserted justification – that recognition was denied because the "fraternal" and "social" nature of GSS was not "consistent with the goals and philosophies" of TAMU. We have already found this conclusion clearly erroneous.

Faced with a fully developed record upon which the trial court deliberately chose not to rule, an eight year old case before us for the second time, and a long overdue request for injunctive relief from violation of a fundamental constitutional right, we decline the opportunity of a second remand. Lest we be criticized for our perhaps overzealous approach, we point out that the Supreme Court did much the same thing in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786-87, 98 S.Ct. 1407, 1421, 55 L.Ed.2d 707 (1978). There, the Court merely observed that the lower court had failed to subject the statute at issue to the appropriate level of scrutiny "because of its view that the First Amendment does not apply to appellants' proposed speech." and moved on to examine the state's asserted interests in regulating corporate speech. *Id.*, 435 U.S. at 787, 98 S.Ct. at 1421.

that the "critical line . . . between advocacy and action" has been violated in this case.

We are not alone in reaching this conclusion. In *Gay Students Organization of the University of New Hampshire* v. *Bonner,* 509 F.2d 652 (1st Cir.1974), the University suspended its earlier recognition of a gay group (GSO) and ordered a strict ban on the group's social functions after a GSO sponsored dance resulted in unfavorable media coverage and criticism by the Governor of New Hampshire. The First Circuit held that the asserted interest in preventing illegal deviate sex acts was insufficient to justify impairment of the group's First Amendment rights because there were neither allegations nor evidence of any illegal or improper acts at GSO's social functions. The Court stated that mere " 'undifferentiated fear or apprehension' of illegal conduct . . . is not enough to overcome First Amendment rights, and speculation that individuals might at some time engage in illegal activity is insufficient to justify regulation by the state." *Id.,* 509 F.2d at 662, *citing Tinker, supra,* 393 U.S. at 508, 89 S.Ct. at 733.

Similarly, in *Gay Alliance of Students* v. *Matthews,* 544 F.2d 162 (4th Cir.1976), the Fourth Circuit concluded that because there was no evidence that the gay group in that case was "an organization devoted to carrying out illegal, specifically proscribed sexual practices," the University's argument that recognition of the group would increase the opportunity for illegal homosexual contact was insufficient to justify the infringement on First Amendment rights. *Id.* at 166. Finally, in *Gay Lib* v. *University of Missouri,* 558 F.2d 848 (8th Cir.1977), *cert. denied,* 434 U.S. 1080, 98 S.Ct. 1276, 55 L.Ed.2d 789, *reh. denied,* 435 U.S. 981, 98 S.Ct. 1632, 56 L.Ed.2d 74 (1978), the District Court had held that nonrecognition of Gay Lib was justified by medical testimony showing that "recognition of Gay Lib would

probably result in . . . violations of Missouri [sodomy] law." *Id.* at 850. The Eighth Circuit reversed, holding that even "accepting the opinions of defendants' experts at face value, we find it insufficient to justify a governmental prior restraint on the right of a group of students to associate for the purposes avowed in their statement . . . of purposes." *Id.* at 854.

[5-7] With regard to Koldus' assertion that GSS lacked the experience to educate the public or provide referral services,[18] we point out that even if Koldus was correct in arguing that the University faculty and staff are better equipped to perform these functions, "the state and its

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[18] GSS's education and referral goals are consistent with the aims of the three gay groups in the other Circuit Court cases we have discussed. In *Gay Students Organization*, the group's purposes included:

> 3) In an effort to educate the public about bisexuality and homosexuality, this organization will attempt to affect social changes through public relations measures such as guest lecturers, free literature, films, newspaper articles and radio programs.
>
> 4) Not the least important reason for establishing a gay organization is to give bisexual and homosexual members of the college community a place to communicate with each other and form discussion groups so that a healthy gay consciousness can evolve among students.

509 F.2d at 654, n. 1.

Similarly, in *Gay Alliance*, the group sought

> (a) to develop a supportive community among individuals who believe in the right of self-determination with regard to sexual orientation, [and] (b) to convene educational situations for members of GAS and for members of the university community regarding homosexual life. . . .

544 F.2d at 162.

Finally, in *Gay Lib* the students' aims included:

> (a) To provide a dialogue between the homosexual and heterosexual members of the university community.
>
> (b) To dispel the lack of information and develop an understanding of the homosexual at the University of Missouri.

agents are forbidden from usurping the students' right to choose." *Gay Alliance, supra,* 544 F.2d at 166. At the heart of the freedom guaranteed by our Constitution is the freedom to choose — even if that choice does not accord with the state's view as to which choice is superior.[19] In *Gay Students Organization, supra,* 509 F.2d at 660, the First Circuit held that the gay group's

> efforts to organize the homosexual minority, "educate" the public as to its plight, and obtain for it better treatment from individuals and from the government thus represent but another example of the associational activity unequivacally singled out for protection in the very "core" of association cases decided by the Supreme Court.

Id. More important, TAMU presented no evidence, nor did the District Court find, that such a goal would "infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education." *Healy, supra,* 408 U.S. at 189, 92 S.Ct. at 2350.

> (c) To alleviate the unnecessary burden of shame felt by the local homosexual population.
>
> (d) To help education, the community and the homosexual to understand the social roles that the homosexual now plays in the community.
>
> (e) To work closely with established university and community groups for a broader sharing of knowledge and information.

558 F.2d at 850.

[19] In finding that " 'affiliation of individuals with homosexual activist organizations may have adverse consequences to some individuals involved,' " was an insufficient reason for non-recognition of a gay group, the Court in *Gay Alliance* stated that the "very essence of the First Amendment is that each individual makes his own decision as to whether joining an organization would be harmful to him, and whether any countervailing benefits outweigh the potential harm." 544 F.2d at 165.

We therefore conclude that none of the reasons for nonrecognition proferred by Dr. Koldus are sufficient to justify the infringement on appellants' First Amendment rights. At trial, however, TAMU asserted yet another alleged justification.[20] It claimed that recognition of GSS would encourage more homosexual conduct, resulting in an increase in the number of persons with the psychological and physiological problems TAMU's experts claimed were more prevalent among homosexuals than among heterosexuals. Thus, TAMU argued that denial of recognition was justifiable as an appropriate means of protecting public health. The District Court stated that this testimony was "credible" although it declined to rely on the evidence, pointing out that the University did not offer such a rationale as a basis for Koldus' decision in 1976.

This asserted justification must fail for the same reasons the others did: TAMU has simply not proven that recognition will indeed imminently result in such dire consequences.

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[20] Amicus Lambda Legal Defense & Education Fund argues that it was reversible error for the District Court to admit evidence concerning this "hindsight" justification over GSS's objections. Because the speech violation occurred at the time recognition was denied, Amicus argues, efforts by the state to "fabricate" some compelling interest "years after" the denial should be ignored by the Court. *See Van Ootegham* v. *Gray*, 628 F.2d 488, 493 n. 6 (5th Cir. 1980) *aff'd in part and remanded on other grounds*, 654 F.2d 304 (1981) *(en banc)* (where court found that state agency discharged homosexual employee on the basis of the constitutionally protected speech, new evidence indicating independent justification for discharge was irrelevant); *University of Southern Mississippi Chapter of Mississippi Civil Liberties Union* v. *University of Southern Mississippi*, 452 F.2d 564, 566 n. 3 (5th Cir. 1971) (although District Court pointed out *sua sponte* additional justification for nonrecognition of student group, Court of Appeals held that a "justification never raised by the University should [not] play a part in our disposition of this case.") We decline to rule on this evidentiary issue, however, because we find appellee's public health argument substantively insufficient to serve as a compelling justification for infringement in this case.

The speculative evidence offered by the defendants' experts "for which no historical or empirical basis is disclosed," cannot justify TAMU's content-based refusal to recognize GSS. *Gay Lib, supra,* 558 F.2d at 854. We think that on this record TAMU's public health argument is precisely the kind of "undifferentiated fear or apprehension" that the Supreme Court has repeatedly held "is not enough to overcome the right to freedom of expression." *Tinker, supra,* 393 U.S. at 508, 89 S.Ct. at 737; *Healy, supra,* 408 U.S. at 191, 92 S.Ct. at 2351.

In *Gay Lib, supra,* the Eighth Circuit concluded that denying recognition to a gay group "smacks of penalizing persons for their status [as homosexuals] rather than their conduct, which is constitutionally impermissible." *Id.* at 856, *citing Robinson* v. *California,* 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). We similarly conclude that none of TAMU's asserted justifications are sufficient to overcome the violation of GSS's rights under the First Amendment.

This leaves TAMU's final argument: that because it never created a forum open for First Amendment discourse, no First Amendment violation has taken place.

PUBLIC FORUM

The District Court found that TAMU had not "created a forum that is generally open to student groups" because it had traditionally refused to recognize fraternal organizations. Finding that GSS was such a fraternal group, the Court concluded that GSS failed to come within the class of student groups entitled to First Amendment protection under *Widmar* v. *Vincent,* 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981). This conclusion was erroneous. As we have already found, GSS was not merely a fraternal group

and was not denied recognition on that basis. Rather, we think that GSS is similar to many other student groups that have received recognition in the TAMU forum[21] — except, of course, for the pro-homosexual nature of its message.

[8, 9] Moreover, we do not agree that by virtue of its traditional exclusion of social fraternities, TAMU may escape the constitutional dictates of *Widmar, supra.* In *Widmar* the Supreme Court held that where a state supported university opens its facilities for use by student groups, it may not exclude a particular group based on the content of the group's intended speech absent a compelling state interest and proof that the interest would not be served by a less restrictive alternative. *Widmar, supra,* 454 U.S. at 269-70, 102 S.Ct. at 274, 70 L.Ed.2d at 447-48, *citing Carey* v. *Brown,* 447 U.S. 455, 461 & 464-65, 100 S.Ct. 2286, 2290 & 2292, 65 L.Ed.2d 263 (1980). As we interpret it, one of TAMU's arguments on appeal is that because it has traditionally refused to recognize fraternal groups, it has not created a "generally open forum" within the meaning of *Widmar;* thus it can refuse to recognize *any* group — not merely fraternal or social groups. In support of this argument, TAMU relies upon *Perry Education Association* v. *Perry Local Educators' Association,* 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983).[22] Although we have grave doubt

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[21] In addition to the groups described at n. 10, *supra,* we point out that O.A.S.I.S., a TAMU-recognized religious group, was apparently authorized to present the view that homosexuality conflicted with the teachings of the Bible. The group publicized its presentation on TAMU bulletin boards with large posters displaying chained hands, captioned "Homosexuality – Not so Gay." It therefore appears that TAMU did not object to the presentation of negative ideas about homosexuality by its recognized student groups.

[22] In *Perry,* the Supreme Court laid out three types of public property "forums" for expressive activity. States may not completely prohibit communication in "quintessential public

that this really presents an arguable contention in view of TAMU's recognition of so many other similar groups, we assume that *Perry* requires us to reach the issue and proceed to determine whether *Perry* compels reversal or remand — or both.[23]

[10] In *Perry*, the Supreme Court held that a public school district could constitutionally limit union use of its internal teacher mailbox system to the exclusive bargaining representative of its teachers. The *Perry* Court relied heavily on its finding that the mailbox system was not a

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forums," such as streets and parks. Content based prohibitions on speech in these areas rarely pass constitutional muster, for any regulation must be "necessary to serve a compelling state interest and ... narrowly drawn to achieve that end." Content neutral time, place and manner restrictions that "leave open ample alternative channels of communication" are permissible when "narrowly tailored to serve a significant government interest." *Perry, supra*, 460 U.S. at –, 103 S.Ct. at 955, 74 L.Ed.2d at 804, *citing Carey* v. *Brown, supra*, 447 U.S. at 461, 100 S.Ct. at 2290.

Public property that "the state has opened for use by the public as a place for expressive activity" constitutes a forum "generally open to the public." States may not selectively prohibit speech in such a "designated" public forum while it remains "generally open," absent compliance with the same constitutional standards applicable to the more traditional public forum. *Perry, supra*, 460 U.S. at –, 103 S.Ct. at 955, 74 L.Ed.2d at 805, *citing Widmar* v. *Vincent, supra*, 454 U.S. at 269-70, 102 S.Ct. at 279.

The third group consists of "[p]ublic property which is not by tradition or designation a forum for public communication. ... In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry, supra*, 103 S.Ct. at 955, 74 L.Ed.2d at 805, *citing United States Postal Service* v. *Greenburgh Civil Association*, 453 U.S. 114, 129-31 & n. 7, 101 S.Ct. 2676, 2684-86 & n. 7, 69 L.Ed.2d 517 (1981).

[23] Since the issue is not before us in this appeal, we do not question the constitutionality of TAMU's exclusion of fraternal groups due to their "social", and as TAMU argues "unprotected" nature.

"public forum" within the scope of *Widmar* — nor was it a "limited public forum" open only to certain groups or for the discussion of certain subjects. 103 S.Ct. at 955, n. 7, 74 L.Ed.2d at 805, n. 7. We think that even if TAMU has not created a generally open forum, as in *Widmar,* it has at the very least created a limited public forum — which *Perry* tells us is "limited" in the sense that "the constitutional right of access would . . . extend only to entities of similar character" to those granted access. *Id.,* 103 S.Ct. at 956, 74 L.Ed.2d at 806. Thus, the *Perry* Court held that if the school had opened its mailboxes to the Cub Scouts or the YMCA, it could not restrict access by "other organizations that engage in activities of interest and educational relevance to students." *Id.* In the instant case, then, because TAMU has opened its forum to other similar student groups, *see* n. 10, *supra,* it may not close the forum to GSS without a compelling reason for doing so.

The conclusion that TAMU is at minimum a limited public forum is buttressed by our recent opinion in *Ysleta Federation of Teachers* v. *Ysleta Independent School District,* 720 F.2d 1429, 1433 (5th Cir.1983), where we had occasion to interpret and apply *Perry* to a slightly different fact situation. In *Ysleta,* an employee organization's access to the school district's internal mail system was suspended by the school superintendent, who stated that certain materials distributed in the boxes by the appellant did not accord with his interpretation of school policy on a particular issue. *Id.* at 431. We began by recognizing that under *Perry,* the internal mail system of a public school is not a traditional public forum. *Id.* at 1432. We added, however, that such a mail system might become a designated public forum if the system is open for use by the general public. Similarly, it might become a "limited public forum by designation" if the school opens it for use by certain groups

or for the discussion of certain subjects. *Id., citing Perry, supra,* 103 S.Ct. at 955 & n. 7, 74 L.Ed.2d at 805 & n. 7. We concluded that the Ysleta mail system was a "limited public forum by designation," for reasons similar to those that convince us that *Perry* presented a different forum than that we confront in the instant case.[24]

More important, and in our opinion dispositive, is the fact that *Perry* squarely held that if the selective access policy adopted by the *Perry* schools functioned to "discourage one viewpoint and advance another," strict scrutiny would apply "regardless of whether a public forum [was] involved." *Perry, supra,* 103 S.Ct. at 957, 74 L.Ed.2d at 807. The five member majority concluded that the schools' denial of access to all but one union was based on the unions' "status," i.e., rival unions as opposed to exclusive bargaining unit, not their views.[25] Concluding that the access policy was viewpoint neutral, the Court questioned only whether the restriction was "reasonable in light of the purpose which the forum at issue serves." *Id.* Contrastingly, in this

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[24] We readily distinguished *Perry* on the basis that in that case "there was no specific policy or practice that the mail system be open to the general public or to employee organizations." *Id., citing Perry, supra,* 103 S.Ct. at 956-57, 74 L.Ed.2d at 806-07. By contract, the Ysleta School District had a written policy making access to the mail system available to all employee organizations once certain procedural filing requirements were met. *Ysleta, supra,* 720 F.2d at 1433. The "filing requirements," though not specifically addressed in our opinion in *Ysleta,* are comparable to TAMU's requirement that only recognized groups are permitted access to its forum.

[25] Justice Brennan, joined by three other Justices, dissented strongly, believing that the majority's First Amendment analysis was flawed by its initial focus on the public forum doctrine. The dissent favored the direct approach to what it termed "discrimination [that] amounts to censorship" – a clear content-based violation of the First Amendment. The majority was apparently unconvinced. It is unclear after *Perry,* then, whether application of the public forum doctrine set out therein must precede direct First Amendment analysis in cases where the doctrine is implicated.

case TAMU admits and the District Court found that TAMU allows other views of homosexuality to be presented on its campus. Moreover, the record shows that TAMU recognized other groups that sought acceptance and integration of their particular lifestyle in the University community.[26] We think that the denial of recognition to a student group wishing to express its own views on the same or similar subjects is clearly the sort of viewpoint based discrimination forbidden by *Perry* in any type of public forum.

This leads us to consider whether any of the asserted reasons for the denial of recognition constitute a sufficiently narrow and compelling state interest to uphold the denial under the public forum analysis we have discussed *supra*. We reach and decide the issue for the same reasons discussed at footnote 17, *supra*. As already determined, all of TAMU's asserted reasons for nonrecognition were insufficient to justify infringement of GSS's rights under the straightforward First Amendment analysis. For the same reasons, they are insufficient to state a compelling interest for content-based regulation in TAMU's forum.

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[26] The District Court found:

> Texas A & M University accepts admitted homosexuals as students and employs admitted homosexuals. Several University professors have invited members of Gay Student Services to speak to their classes. The Court finds that Texas A & M University's refusal to extend official recognition to Gay Student Services was not based upon the content of Gay Student Services' ideas about homosexuality . . . because the University permits ideas about homosexuality to be freely presented by speakers in University classrooms.

Of course, as we have already found, the finding that denial of recognition was not based on the homosexual nature of GSS is clearly erroneous. Although the record supports the finding that several classes have had speakers on homosexuality, the conclusion that this factor alone makes TAMU a place where ideas about homosexuality are "freely presented" is clearly belied by the fact that recognition was denied to GSS. *See also* discussion regarding other student groups at nn. 10 & 21, *supra*.

DAMAGES

[11, 12] GSS also asserts that the District Court erred in finding that any award of damages was barred by the Eleventh Amendment.[27] Appellants urge us to "carefully craft" a judgment wherein monetary damages would come from bookstore profits or from student service fees, neither of which funds are kept in the state treasury. They cite, however, no authority that convinces us that a federal court should exercise any such power to avoid the proscription of the Eleventh Amendment. We are convinced that the District Court properly applied Supreme Court precedent in *Zentgraf* v. *Texas A & M University,* 492 F.Supp. 265 (S.D.Tex.1980), a sex discrimination suit brought against TAMU. After examining the legal relationship between the state and TAMU,[28] the Court concluded that because TAMU was an alter ego of the State of Texas, "any suit against the University or its officials for monetary relief is a suit against the state and thereby barred by the Eleventh Amendment." *Id.* at 271-72.

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[27] The Eleventh Amendment prohibits suits for monetary relief by private parties in federal court against a state and its agencies, absent waiver by the state. The Supreme Court has construed the Eleventh Amendment to bar suits for money damages such as this one under § 1983 against entities and officials so closely affiliated with the state as to make the state the real party in interest. *Quern* v. *Jordan,* 440 U.S. 32, 99 S.Ct. 1139, 59 L.Ed2d 358 (1979); *Alabama* v. *Pugh,,* 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978); *Mount Healthy City School District Board of Education* v. *Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); *Edelman* v. *Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

[28] TAMU was created by the Texas Legislature in 1871. The statutes authorizing its operation and providing for its governance are codified at Tex.Educ.Code §§ 85.01 *et seq.* (Vernon Ann.). The University's Board of Regents are appointed by the Governor with the advice and consent of the Senate. *Id.* § 85.11. TAMU's operating expenses are paid by legislative appropriations. *See Zentgraf, supra,* 492 F.Supp. at 272.

CONCLUSION

TAMU's refusal to recognize GSS as an on-campus student organization impermissibly denied appellants their First Amendment rights.[29] The judgment of the District Court is therefore reversed and the case is remanded for the entry of appropriate injunctive and declaratory relief in accordance with this opinion.

REVERSED AND REMANDED.

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[29] We therefore need not reach GSS's argument that it was denied Due Process or the Amicus claim that GSS was denied Equal Protection.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-77-325

GAY STUDENT SERVICES, ET AL

VS.

TEXAS A & M UNIVERSITY, ET AL

FINAL JUDGMENT

Pursuant to the Court's Findings of Fact and Conclusions of Law of this date, it is

ORDERED and ADJUDGED that Plaintiffs take nothing by way of this action, that this action be dismissed on the merits, and that Defendants may recover their costs.

DONE at Houston, Texas this 19th day of May, 1982.

Ross N. Sterling
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-77-325

GAY STUDENT SERVICES, ET AL

VS.

TEXAS A & M UNIVERSITY, ET AL

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The judgment of dismissal entered in this action on November 2, 1977, was vacated and the cause remanded. *Gay Student Services* v. *Texas A & M University,* 612 F.2d 160 (5th Cir.), *cert. denied,* 449 U.S. 1034 (1980). The case came on for trial by the Court on November 16, 1981. The allegations in the complaint are set forth in detail in the Fifth Circuit's opinion. *Id.* at 162. The Court concludes that Plaintiffs failed to prove by a preponderance of the evidence that Defendants' refusal to recognize Gay Student Services as an official student organization at Texas A & M University infringed upon Plaintiffs' freedom of speech or association. Based upon the evidence adduced at trial, the Court enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. In 1976, Plaintiffs J. M. Minton, Keith Stewart and Patricia Wooldridge were members of Gay Student Services. The members of Gay Student Services were students attending Texas A & M University.

2. Texas A & M University is a state supported educational institution. Any judgment against Texas A & M University or its board of regents or officers for actions done within the scope of their duties would be paid out of the state treasury.

3. On April 4, 1976, several representatives of Gay Student Services met with Defendant John Koldus, Vice President for Student Services at Texas A & M University. The student representatives asked Koldus for permission to use University facilities to hold meetings and to use campus bulletin boards to post notices and literature. Koldus informed the students that these privileges were extended only to student groups that had received formal recognition from the University. On April 5, 1976, Gay Student Services formally applied for recognition.

4. On November 29, 1976, Koldus wrote a letter denying formal recognition to Gay Student Services, stating that the purposes of Gay Student Services were not consistent with the philosophy and goals of Texas A & M University.[1]

5. In 1976, Texas A & M University regulations provided that official recognition would be extended only to

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[1] Two additional reasons have been suggested for Koldus' denial of recognition. In his deposition, Koldus stated that Gay Student Services' application for recognition contained a technical deficiency which could be rectified easily. Defendants did not press this issue at trial as a sufficient reason for Koldus' decision.

At trial, Defendants did offer evidence that recognition of Gay Student Services would tend to encourage more homosexual conduct, resulting not only in violations of the penal code but also in an increase in the number of persons with psychological and medical problems associated with homosexuality. The Court finds the testimony that male homosexuals pose a signficant public health problem because they have a greater incidence of venereal disease to be credible. While the compelling need for all state agencies, including Texas A & M University, to discourage this public health risk might be a sufficient basis for denial of recognition of Gay Student Services, the University did not offer this reason as a basis for Koldus' decision in 1976, and the Court does not rely upon this evidence as a basis for its decision.

Plaintiffs responded to this medical evidence by seeking a trial amendment to state a cause of action under 29 U.S.C. § 794. The Court granted the motion. Since there was no evidence that Texas A & M University receives federal financial assistance, Plaintiffs failed to make a prima facie case under 29 U.S.C. § 794.

those student organizations whose purposes and goals were consistent with the University's philosophy. The University did not and has not, to the time of trial of this case, recognized fraternal organizations, i.e. student groups whose principal if not sole purpose is to hold social gatherings to encourage friendships and personal affinity. Thus, Texas A & M University has not created a forum that is generally open to all student groups.

6. Gay Student Services was not organized for political advocacy and the group has no official position regarding repeal of Tex. Penal Code Ann., § 21.06, which makes homosexual conduct a misdemeanor. Gay Student Services has held meetings in private homes and other off-campus locations, and the students attending these meetings generally discuss grades, which professor's courses to enroll in and which to avoid and other subjects likely to be discussed by most college students.

7. Texas A & M University accepts admitted homosexuals as students and employs admitted homosexuals. Several University professors have invited members of Gay Student Services to speak to their classes. The Court finds that Texas A & M University's refusal to extend official recognition to Gay Student Services was not based upon the content of Gay Student Services' ideas about homosexuality, since the group is not trying to convey any message about homosexuality and because the University permits ideas about homosexuality to be freely presented by speakers in University classrooms. The Court finds that Texas A & M University's refusal to extend official recognition to Gay Student Services was not a restraint on the students' right of association, since the purpose of the association was not a goal otherwise protected by the First Amendment.

8. Any conclusions of law which may be deemed findings of fact are adopted as part of these findings.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the subject matter and parties to this action.

2. Any judgment against Texas A & M University, its board of regents or officers for actions done within the scope of their official duties would be paid out of the state treasury, and Plaintiffs' claims for damages against the University or its regents or officers are barred by the Eleventh Amendment. *United Carolina Bank* v. *Board of Regents,* 665 F.2d 553, 561 (5th Cir. 1982); *Zentgraf* v. *Texas A & M University,* 492 F.Supp. 265, 271-72 (S.D. Texas. 1980).

3. First Amendment rights must be considered in light of the environment and special characteristics of the governmental institution involved. *Healy* v. *James,* 408 U.S. 169, 1980 (1972). Where a public university provides a generally open forum in which student groups of all types receive the benefits of official recognition, the university may not then discriminate against a particular group based on the content of the message that the group is seeking to convey. *Widmar* v. *Vincent,* . . . U.S. . . . , 102 S.Ct. 269, 274 (1981). But Texas A & M University does not extend the benefits of official recognition to all types of student groups. While the forum at Texas A & M University is open to ideas about homosexuality, the University refuses to extend the benefits of official recognition to fraternal or social groups such as Gay Student Services whose message is mere friendship or personal affinity.

4. The First Amendment right of freedom of association does not protect mere friendship or personal affinity, but rather protects the right to join with others in the advocacy of beliefs or the exercise of other rights protected by the First Amendment. *See NAACP* v. *Alabama ex rel. Patterson,* 357 U.S. 449, 460 (1958). Since Gay Student Services'

message was mere friendship and a sharing of concerns about classes and professors, Plaintiffs' right to freedom of association was not infringed.

5. Any findings of fact that may be deemed conclusions of law are adopted as part of these conclusions.

DONE at Houston, Texas, this 19th day of May, 1982.

Ross N. Sterling
United States District Judge

APPENDIX C

449 U.S. 1034, 66 L.Ed.2d 495
TEXAS A & M UNIVERSITY et al.,

Petitioners,

VS.

GAY STUDENT SERVICES, et al.
NO. 80-252.

Facts and opinion, 612 F.2d 160; 620 F.2d 300.

Petition for writ of certiorari to [from] the United States Court of Appeals for the Fifth Circuit.

Dec. 8, 1980. Denied.

APPENDIX D

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

DENIALS OF REHEARING EN BANC

Title	Docket Number	Date of Denial	Citation of Panel Decision
Gay Student Services v. Texas A&M University	77-3395	5/16/80	S.D.Tex., 612 F.2d 1300

APPENDIX E

GAY STUDENT SERVICES, et al.,
Plaintiffs-Appellants,

VS.

TEXAS A & M UNIVERSITY et al.,
Defendants-Appellees.

NO. 77-3395.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

Feb. 20, 1980.

Students belonging to homosexual organization which had been denied official registration as student organization brought action against the college. The United States District Court for the Southern District of Texas, Ross N. Sterling, J., dismissed and students appealed. The Court of Appeals, Coleman, Chief Judge, held that: (1) university was a person for purposes of federal civil rights statute; (2) Eleventh Amendment did not bar claim for injunctive and declaratory relief; (3) students had standing; and (4) court had civil rights jurisdiction over the claim.

Vacated and remanded.

Nelson & Mallett, J. Patrick Wiseman, Hormachea & Sauer, Larry Sauer, Sarah Scott, Houston, Tex., for plaintiffs-appellants.

Robert G. Turner, Houston, Tex., for National Gay Task Force.

Donald C. Knutson, San Francisco, Cal., Thomas F. Coleman, Los Angeles, Cal., for National Committee for Sexual Civil Liberties.

Lonny F. Zwiener, Nathan Johnson, Asst. Attys. Gen., Austin, Tex., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before COLEMAN, Chief Judge, FRANK M. JOHNSON, Jr., and POLITZ, Circuit Judges.

COLEMAN, Chief Judge.

The plaintiffs-appellants are student members of Gay Student Services, a voluntary association which has sought and been denied official registration as a student organization by Texas A & M University at College Station.[1]

The complaint alleged that on April 4, 1976 representatives of Gay Student Services met with Dr. John Koldus and requested certain privileges for their organization, including access to bulletin boards and facilities for special events. This request was refused and the students informed Dr. Koldus that they would request *formal recognition* of Gay Student Services. Dr. Koldus told the students to submit their formal application to Dr. Adair, Director of Student Activities; he then would suspend the regular procedure of appealing to the Student Organization Board and would personally render a decision on the application.

Application for recognition was submitted April 5, 1976. On May 4, 1976, representatives of Gay Student Services met again with Dr. Koldus, who reported that he had written a response to the application but had been asked by University officials to delay its release until the President and

[1] Listed as defendants are Texas A & M University, Jack K. Williams, President of Texas A & M at College Station, John J. Koldus, Vice-President for Student Services at Texas A & M at College Station, and W. C. Freeman, Executive Vice-President for Administration at Texas A & M at College Station. Also named as defendants are the members of the Board of Regents for Texas A & M. All defendants are sued in their *official* capacities and not individually.

University legal staff had an opportunity to study the request. Koldus also told the student representatives that he had ordered the "Batallion," the student newspaper, not to print stories about Gay Student Services but that he was changing this order so that news articles could be printed.

On November 29, 1976, Dr. Koldus wrote a letter denying official recognition to the group. In this letter he noted that homosexual conduct was illegal in Texas [as it undoubtedly is under Chapter 21 of the Texas Criminal Code] and that Gay Student Services was likely to promote and incite acts contrary to and in violation of the Texas Penal Code. He concluded that Gay Student Services was not "consistent with the philosophy and goals that have been developed for the creation and existence of Texas A & M University."

The complaint further alleges that due to the denial of official recognition the group has been forced to secure off-campus meeting places, involving rent and maintenance costs; meetings have often been in private homes, limiting the number who can attend; hostility of other students toward the organization has increased; members of the organization have been restricted in their ability to speak to classes and seminars; advertising and distribution of literature informing students of meetings, services, and educational goals of the organization has been severely limited; and "traditional myths" about sexual stereotypes have been reinforced. The plaintiffs further state that Texas A & M University has at no time prohibited the enrollment of men and women who openly identify themselves as homosexuals. Nevertheless, it refuses these students the same rights as other students to organize and meet for the purpose of discussing common interests and problems.

The relief sought by plaintiffs included (1) an injunction permanently enjoining the defendants from continuing to

enforce their policy in refusing to recognize Gay Student Services, (2) a declaratory judgment declaring the policy of the defendants unconstitutional on its face, (3) damages for the deprivation of their rights to express their views and assemble together, and (4) costs, including reasonable attorneys fees.

The defendants answered, admitting only that Gay Student Services had applied for official University recognition and had been denied.

On June 28, 1977, the defendants filed a motion to dismiss. It was alleged that (1) Texas A & M University and the other named individual defendants, sued in their official capacity, were not "persons" for the purposes of 42 U.S.C. § 1983; therefore, jurisdiction was lacking under 28 U.S.C. § 1343, (2) plaintiffs had not stated a cause of action giving rise to general federal question jurisdiction under 28 U.S.C. § 1331, (3) plaintiffs had not overcome the jurisdictional bar of the 11th Amendment, (4) plaintiffs did not have standing to assert the cause they sought to bring, and that (5) dismissal of the cause as pleaded under §§ 2201 and 2202 was proper.

On November 2, 1977, the District Court entered an order granting defendants' motion to dismiss, commenting only that the motion appeared to be "meritorious and unopposed." No specific ground for the action was stated.

[1, 2] Since the dismissal order does not tell us the legal theory upon which the dismissal was based, we proceed to a consideration of all the grounds asserted in the motion to determine whether at this juncture dismissal could have properly been predicated on any one of them.[2]

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[2] The motion to dismiss did not state that it was premised upon a failure to state a claim upon which relief can be granted. F.R.Civ.P. 12(b)(6). We note that such a claim would fail, nevertheless, under the standard set out in *Conley* v. *Gibson*,

The result is that the dismissal must be vacated and the case remanded for further proceedings not inconsistent herewith.

I.

Asserted Ground No. 1: § 1983 "person" status

At the time this suit was dismissed by the District Court the Supreme Court decision in *Monell* v. *Department of Social Services of City of New York,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), had not been handed down. Prior to *Monell,* suits against cities and similar local governmental agencies had been barred under 42 U.S.C. § 1983 because such entities were not "persons" within the meaning of the statute, *City of Kenosha* v. *Bruno,* 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973); *Moor* v. *County of Alameda,* 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973); *Monroe* v. *Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

Monell held:

> Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.

436 U.S. at 690, 98 S.Ct. at 2035-36.

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355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), that such a motion should not be granted unless it appears to a certainty that the plaintiff would not be entitled to recover under any statement of facts which could be proved in support of his claim. *See Reeves* v. *City of Jackson,* 532 F.2d 491 (5th Cir. 1976); *Cook & Nichol, Inc.* v. *Plimsoll Club,* 451 F.2d 505 (5th Cir. 1971).

[3-5] Consequently, an institution of higher learning, such as the university here involved, no longer enjoys absolute § 1983 immunity.[3] *Monell* did not specifically mention universities as "persons" but there would appear to be no analytical difference in the operation of universities and other governing bodies such as cities. *See Goss* v. *San Jacinto Junior College,* 588 F.2d 96 (5th Cir. 1979), holding San Jacinto Junior College to be a "person" for purposes of § 1983.

Of course, for a university to be suable under § 1983, the injury must be due to an official policy or custom. The *Monell* Court stated:

> On the other hand, the language of § 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor — or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory. 436 U.S. at 691, 98 S.Ct. at 2036.
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> * * * *
>
> We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execu-

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[3] The *Monell* majority opinion also stated in a footnote: "Our holding today is, of course, limited to local government units which are not considered part of the State for Eleventh Amendment purposes." 436 U.S. at 690 n. 54, 98 S.Ct. at 2035-36 n. 54. An entity may be a "person" under § 1983 yet still not be sued for monetary relief due to Eleventh Amendment immunity based upon the entity's close connection with the State and its treasury. This does not, however, prevent declaratory or injunctive relief. The word "person" as used in § 1983 is not intended to have a bifurcated application dependent on the nature of the relief sought. *City of Kenosha* v. *Bruno,* 412 U.S. 507, 513, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973).

> tion of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983. 436 U.S. at 694, 98 S.Ct. at 2038.

[6] **The undisputed allegations of the complaint makes it clear that the defendant University officials in this case were, with authority, promulgating and enforcing the official policy of the University as to the controversy in issue.**

This "person" status applies to University officials when sued in their official capacity. As *Monell* stated in a footnote:

> Since official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent — at least where Eleventh Amendment considerations do not control analysis — our holding today that local governments can be sued under § 1983 necessarily decides that local government officials sued in their official capacities are "persons" under § 1983 in those cases in which, as here, a local government would be suable in its own name.

436 U.S. at 690 n. 55, 98 S.Ct. at 2036-55. *See Rainey* v. *Jackson State College*, 591 F.2d 1002 (5th Cir. 1979); *Harkless* v. *Sweeny Independent School District of Sweeny, Texas*, 554 F.2d 1353 (5th Cir.), *cert. denied*, 434 U.S. 966, 98 S.Ct. 507, 54 L.Ed.2d 452 (1977).[4]

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[4] After *Monell* was handed down, a number of district court cases holding cities and other various local governing bodies as not "persons" were vacated and remanded for application of *Monell*. *See, e.g., McKnight* v. *Southeastern Pennsylvania Transportation Authority*, 583 F.2d 1229 (3rd Cir. 1978) (vacating a district court decision relying on pre-*Monell* law in holding the state government entity SEPTA not a "person" under § 1983); *Kurek* v. *Pleasure Driveway and Park District of Peoria, Illinois*, 583 F.2d 378 (7th Cir. 1978) (remanding civil rights action against Park

II.

Asserted Ground No. 2: 11th Amendment Immunity

[7] If the plaintiffs were seeking only monetary recovery from the defendants, we would first examine the nature of the entity sued to determine whether it is an arm of the state or an independent "political subdivision". *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). *See Goss* v. *San Jacinto Junior College, supra* at 98. If Texas A & M University is an arm of the state such that any recovery of damages would, in effect, be against the state, to come from the state treasury, then the Eleventh Amendment would bar the action and recovery.[5] If the University is an inde-

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District in light of *Monell* establishing governmental units as "persons").

For Fifth Circuit cases vacated and remanded in light of *Monell*, *see, e.g.*, *Thurston* v. *Dekle*, 531 F.2d 1264 (5th Cir. 1976) (holding city was not suable under § 1983 as a "person" but individual members of municipal agencies were suable in their official capacities), *vacated*, 438 U.S. 901, 98 S.Ct. 3118, 57 L.Ed.2d 1144, *on remand*, 578 F.2d 1167 (5th Cir. 1978) (vacating and remanding to the district court); *Muzquiz* v. *City of San Antonio*, 528 F.2d 499 (5th Cir. 1976) (en banc) (holding that neither the city nor the Board of Trustees of the policeman and fireman pension fund was a § 1983 "person"), *vacated*, 438 U.S. 901, 98 S.Ct. 3117, 57 L.Ed.2d 1144, *on remand*, 586 F.2d 529 (5th Cir. 1978) (city and board held to be "persons" amenable to suit under § 1983).

[5] Numerous circuit decisions have found universities to be so closely connected with the state that a suit against the university or its officials is the same as a suit against the state. *E.g.*, *Jagnandan* v. *Giles*, 538 F.2d 1166 (5th Cir. 1976) (officials and members of Board of Trustees of Mississippi State University held immune from suit to recover excess payments of tuition by resident alien students); *Prebble* v. *Brodrick*, 535 F.2d 605 (10th Cir. 1976) (suit against members of Board of Trustees of the University of Wyoming barred); *Long* v. *Richardson*, 525 F.2d 74 (6th Cir. 1975) (Memphis State University officials immune); *Thonen* v. *Jenkins*, 517 F.2d 3 (4th Cir. 1975) (East Carolina University officials immune); *Brennan* v. *University of Kansas*, 451 F.2d 1287 (10th Cir. 1971) (University of Kansas

pendent political body or has in some manner waived its immunity, however, monetary recovery would not impinge on the Eleventh Amendment.[6]

[8] We need not now decide this issue because the plaintiffs seek injunctive and declaratory relief as well as monetary relief. Indeed, the main thrust of plaintiffs' suit is for

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and University Press of Kansas immune as alter egos of the state); *Walstad* v. *University of Minnesota Hosps.*, 442 F.2d 634 (8th Cir. 1971).

While we make no determination here concerning the relationship of Texas A & M University to the state of Texas for Eleventh Amendment immunity purposes, we do note that at least one other Texas University with its governing board and officials has been held immune from monetary damages or relief based on the Eleventh Amendment. *Ramos* v. *Texas Tech University*, 441 F.Supp. 1050 (N.D. Tex. 1977), *affirmed on basis of opinion below*, 566 F.2d 573 (5th Cir. 1978) (per curiam). *See Henry* v. *Texas Tech University*, 466 F.Supp. 141 (N.D. Tex. 1979) (explaining in more detail the status of Texas Tech University as an arm of the state and thus immune under the Eleventh Amendment).

[6] Institutions of higher learning that are not so closely connected with the state as to be an instrumentality of the state but rather display the characteristics of an independent body are not immune from suit for monetary relief. *See, e.g., Goss* v. *San Jacinto Junior College*, 588 F.2d 96 (5th Cir. 1979), *citing Hander* v. *San Jacinto Junior College*, 519 F.2d 273, *aff'd per curiam on rehearing*, 522 F.2d 204 (5th Cir. 1975) (under Texas code suit against the state); *Samuel* v. *University of Pittsburgh*, 538 F.2d 991 (3rd Cir. 1976) (University of Pittsburgh, Temple University and Penn State University held liable for equitable restitution of tuition fees because of not being state instrumentalities).

Waiver of immunity may occur under state statute or school charter. *See, e.g., Hostrop* v. *Board of Junior College District No. 515*, 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963, 96 S.Ct. 1748, 48 L.Ed.2d 208 (school board permitted to be sued "in all courts" under a state code provision held to waive immunity); *Soni* v. *Board of Trustees of University of Tennessee*, 513 F.2d 347 (6th Cir. 1975), *cert. denied*, 426 U.S. 919, 96 S.Ct. 2623, 49 L.Ed.2d 372 (1976) (suit permitted due to waiver explicit in University's charter allowing suit "in any court of law or equity").

injunctive relief ordering the University and its officials to grant recognition to plaintiffs' organization. Under *Edelman* v. *Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) and *Ex parte Young,* 209 U.S. 123, S.Ct. 441, 52 L.Ed. 714 (1908), prospective injunctive relief is clearly allowed against state officials in their official capacities. Dismissal of plaintiffs' claim based upon Eleventh Amendment immunity, therefore, was improper in light of the injunctive relief south. *See Jagnandan* v. *Giles,* 538 F.2d 1166 (5th Cir. 1976) (injunctive relief granted in § 1983 suit declaring state statute unconstitutional but damages denied because of immunity); *Hander* v. *San Jacinto Junior College,* 519 F.2d 273, *aff'd per curiam on rehearing,* 522 F.2d 204 (5th Cir. 1975) (injunction granted in § 1983 suit for reinstatement of faculty member).

III.

Asserted Ground No. 3: Standing

[9] The assertion that plaintiffs lack standing to bring the suit is *frivolous.*

IV.

Asserted Ground No. 4: § 1331 jurisdiction and cause of action

[10] A fourth ground asserted for dismissal of the present action is that plaintiffs fail to state cause of action for general federal question jurisdiction under 28 U.S.C. § 1331. This is wholly immaterial because jurisdiction has been properly established under 28 U.S.C. § 1343 for a § 1983 cause of action.

DECLARATORY JUDGMENT

[11] Since jurisdiction has been established at least under § 1343 and § 1983, the separate remedy available through declaratory judgment may also proceed. *Red Lobster Inns of America, Inc.* v. *New England Oyster House, Inc.,* 524 F.2d 968 (5th Cir. 1975).

CONCLUSION

In view of the foregoing considerations we conclude that the District Court should not have dismissed the complaint on any of the grounds asserted in the motion for dismissal.

In remanding the case for disposition on the merits we intimate no opinion as to how the case should be decided once the relevant facts have been fully developed.

The standards applicable to the disposition of a case of the kind presently before us have never been *specifically* illuminated by the Supreme Court. *See Ratchford* v. *Gay Lib* (dissent to the denial of certiorari), 434 U.S. 1080, 98 S.Ct. 1276, 55 L.Ed.2d 789 (1978). Some of the cases dealing with First Amendment rights of college student associations are footnoted below.[7]

VACATED and REMANDED for further proceedings not inconsistent herewith.

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[7] *Healy* v. *James*, 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972); *Papish* v. *University of Missouri Curators*, 410 U.S. 667, 93 S.Ct. 1197, 35 L.Ed.2d 618 (1973). In *Healy* it was held that the student organization in question was entitled to recognition under the First Amendment unless there was a showing that the group directly advocated inciting or producing imminent lawless action likely to cause such a result. *Healy* also cited *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503 at 513, 89 S.Ct. 733, 21 L.Ed.2d 731, for the principle that the power to prohibit "lawless action" is not limited to acts of a criminal nature but may reach actions which "materially and substantially disrupt the work and discipline of the school", etc., 408 U.S. at 189, 92 S.Ct. at 2350.

See. also, Gay Students Organizatio of the University of New Hampshire v. *Bonner*, 509 F.2d 652 (1st Cir. 1974); *Gay Alliance of Students* v. *Matthews*, 544 F.2d 162 (4th Cir. 1976); and *Gay Lib.* v. *University of Missouri*, *supra*, 558 F.2d 848 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080, 98 S.Ct. 1276, 55 L.Ed.2d 789 (1978); *M.C.L.U.* v. *University of Southern Mississippi*, 452 F.2d 564 (5th Cir. 1971); *Hudson* v. *Harris*, 478 F.2d 244 (10th Cir. 1973); *Mississippi Gay Alliance* v. *Goudelock*, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982, 97 S.Ct. 1678, 52 L.Ed.2d 377 (1977).

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

CASE NUMBER 82-2366

GAY STUDENT SERVICES, ET AL.

VS.

TEXAS A&M UNIVERSITY, ET AL.

Notice is hereby given that Texas A&M University, the Board of Regents For Texas A&M University and other Texas A&M University officers and employees (Defendants-Appellees in the Fifth Circuit), hereby appeal to the Supreme Court of the United States from the judgment of the United States Court of Appeals for the Fifth Circuit, dated August 3, 1984, reversing and remanding the prior judgment of the United States District Court for the Southern District of Texas dated May 19, 1982.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

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U.S. COURT OF APPEALS
FILED
OCT 31 1984
GILBERT F. GANUCHEAU
CLERK

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal to the Supreme Court of the United States has been served on all counsel of record by placing same in the United States mail, certified, return receipt requested, this 30th day of October, 1984.

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[4] Service was actually made on the office of Attorney General and on Ann Kraatz, Assistant Attorney General. Jim Mattox is currently the Attorney General and Mark White is now the Governor of the State of Texas. In that Mark White was Attorney General in November of 1982 when this case was argued to the Fifth Circuit and in that Mark White [as] Attorney General of Texas is still counsel of record (Jim Mattox as Attorney General having never made an appearance in this case), Mark White's name is listed above in order to comply with Sup. Ct. R. 28 requiring service on *counsel of record.*